THE

MONTHLY LAW REPORTER.

NOVEMBER, 1862.

SHAKSPEARE AS A LAWYER.

REGRET has often been expressed that we know so little of the life of William Shakspeare. The facts of his biography were not reckoned of sufficient value to be collected, till they had mainly undergone the "razure of oblivion," and then the busy gleaner's hand could only gather the meagre details which have come down to us. One consolation for the loss is, that he wrote his life most expressively on the monuments of his genius. The framework of events through which he passed, might add very little to the record of his works. Sometimes, unfortunately, the life and the productions of genius, when they are both known to us, are not found to be of a piece. We look in vain in the former for the genius which animates the latter; and are fortunate if the life picture do not prove the ugly reverse of the charms which adorn the work of art. This we realize in reading the painful details of Beethoven's life. He may be called the Shakspeare of music. His works are sublime and deep, with the intellect as well as the poetry of music. They exhibit a mind of gigantic power and originality, an imagination unsurpassed, and the profoundest sensibilities. But the record of his life is an unpleasant jargon, and displays a man whose wayward temperament and gusts of passion were a torment to himself and others. Would it not, at least, be more pleasant, if the memory of Beethoven's life were cancelled, and the imagination were left free to surmise such a life as we think suitable to such a genius? Perhaps the same observation may be made respecting the life of Shakspeare. What we do know of him is scarcely consistent with our admiration of the great dramatist, whose words have become the vocabulary of all speaking the English tongue, and whose impressive thoughts and images are familiar to every educated mind. That such a person should have become involved with Ann Hathaway, eight years his senior, and been obliged to marry her when he was but eighteen; that he was driven to London by his deer stealing, and to this circumstance the world may be indebted for his dramatic works, which else had shared the fate of the might-have-been lays

of the "mute, inglorious Miltons" described in Gray's Elegy: all this is so inconsistent with the dignity of his genius, that some might reckon it as well unknown. Could we see "the immortal" in his daily walks delineated with the graphic fidelity of a Boswell, it might be no agreeable picture for those who are foolishly bent on worshipping human genius.

One advantage, certainly, has been derived from the scantiness of our knowledge of the life of Shakspeare; and that is, the field for ingenuity which has thus been opened, and has been fruitful with so much of pleasing speculation. Shakspeare has almost got to be a myth: and "the myriad-minded" has shared the honor with Homer of being indefinitely multiplied in personality. As with the latter, so with the former, it is matter of ingenious dispute whether he wrote all the plays ascribed to him; whether indeed all such were not the combined work of a club of writers. If the latter be true, it must be admitted that each was Shakspeare; and that not only have such brilliant stars seldom shone in one constellation, but never elsewhere have their beams been confluent in one individuality of style and sentiment.

Not the least pleasing, to our mind, among these ingenious researches in the biography of Shakspeare, is the exploration of a period of his life, during which the literary world are divided in opinion whether he was an attorney's clerk, an assistant schoolmaster, or an assistant *butcher!* The time in question is from about 1579, when he probably left school, to 1586, when he is supposed to have gone to London.

If he ever was connected with the business of an attorney, he held some subordinate relation to it; for the court rolls would bear witness to the fact, if he had been admitted to practice as an attorney. Had he even been an attorney's clerk, he would probably have attested many deeds, some of which would be likely to be extant: yet none such have come to light. The only extrinsic evidence that he was ever an attorney's clerk, consists in an alleged libel upon Shakspeare by Thomas Nash, which alludes to him as one of those who "learn the trade of *noverint*, whereto they were born." The libel does not name Shakspeare, but it describes its subject as one who could "afford you whole Hamlets," &c. The trade of *noverint* no doubt designates a deed maker, this being the opening word in such instruments, "*Noverint universi per presentes.*" This libel was published by one Greene, whose business, with that of Nash, had been diminished by the popularity of Shakspeare. Greene afterwards gave vent to his spleen in a direct attack upon Shakspeare; whom he calls *Shakscene*, and seeks to stigmatize as a ranter. But Greene's libel does not renew the fling of abandoning the attorney's business. The phrase of being "born" to the attorney's trade, would imply that the father was also an attorney, which

Shakspeare's certainly was not. The chain of argument is therefore frail as gossamer in several of its links. First, that Shakspeare is alluded to in Nash's libel is inferred from Nash's supposed jealousy of Shakspeare as a more successful author. This again is inferred from the evident spleen of Greene, Nash's publisher, exhibited in a subsequent libel by Greene; which spleen is supposed to be founded on a diminution in Greene's profits from another writer eclipsing the author who furnished copy for his press. Something had vexed him, clearly, as the ill-temper of the libel proves, and competition is supposed to be the cause which makes most "doctors disagree." Greene was bitter on Shakspeare; but that it was because he did not have Shakspeare's publishing, and that his own publishing was undone by Shakspeare's eclipsing his writer, Nash, is a mere speculation of ingenuity. Then, supposing it proved from Greene's ill-humor that Nash was thrown into the shade, from this premise we are to infer that Nash also is bitter upon Shakspeare, with no corroborative circumstance except the phrase, "whole Hamlets." Hamlet was not published, in its perfected form, till after the libel; but we are at liberty to imagine, if we will, that it may have been previously written in the first draft, and thus performed on the stage. This reasoning in proof of Shakspeare's having been an attorney's clerk is hardly sufficient to warrant us in annexing, as Spinosa does, often with no better warrant, to his statements of argument—Q. E. D. *questio est demonstrata.*

We must resort to other evidence; and to clear the way for it, let us dispose of a preliminary objection in the supposed incompatibility of poetry and law. Among other popular disparagements of the legal profession, it is said to be hardening to the sensibilities and narrowing to the mind. Thus, Wordsworth, in his lines upon a poet's grave, requests the attorney, with "the keenness of his practised eye," to keep his distance, as being altogether incapable of appreciating the æsthetic beauties which once adorned the sleeping bard. We suspect, however, this popular allegation against lawyers, of insensibility, is founded, like the charge against them of want of conscience, on mere vulgar prejudice. That there are numbered among the profession unscrupulous and narrow minds, it would be idle to deny, as it would be impossible to prove that there are not such in every department of life. But that the general character of the profession is far different, is constantly proved by the noble lives of large minded, liberal hearted, and conscientious lawyers. It is supposed that presenting the merits of one side of a case furnishes a temptation to swerve from veracity: if this be so, it is not necessary to yield to the temptation; and many are the lawyers whose word is reliable as a bond. And it is equally true that the merchant, vending goods, represents only one side of the case, namely, the interest of the seller; and quite as great is his

temptation, and not better resisted, to exaggerate the merits and cover the defects of his commodity. So, too, while the practice of law trains the mind to nice intellectual distinctions, and may tend to narrow and harden it; this is likewise true of other pursuits to which the division of labor in society has concentrated the powers of mind and body. Undoubtedly, if the lawyer dedicates himself simply to the law, without stepping outside into the fields of moral, intellectual, and religious culture, the effect will be to develop his powers in the single direction of jurisprudence, and dwarf them in all other departments. But this is not true of the practice of law alone. It is even more applicable to all other departments of business, because scarcely any of them involve so large a field of acquisition. The merchant need know nothing but markets; while the lawyer, to become proficient in jurisprudence, must acquire an extensive knowledge of history, by which the system of law has been gradually moulded, and must study to understand the human social character as manifested in a great diversity of circumstances and periods of time; for it is this character which has given a shape to the common and statute law. Nor is this enough. To be able to apply his legal knowledge, after he has got it, to successful forensic practice, he must make a study of eloquence, which involves largely the culture of the fine arts and extensive acquaintance with *belles lettres;* and he must also become an adept in human character, so that he can read men through as they rise on the witness stand, or sit in the panel. He must also have a knowledge of practical arts and mercantile and maritime usages; for these are continually involved in the trial of causes. A narrow mind will scarcely hold so much as all this; and hence we find the successful lawyer, in any distinguished sense of the term, to be ordinarily a man of large and varied acquisition.

It is capable of proof, too, that the study of the law may furnish an excellent discipline for the literary mind, even in the department of poetry. Milton, it is well known, studied law at one period in his career. For a more modern instance, Bailey, the author of Festus, may be cited, as one who has not found the cultivation of the poetic art inconsistent with the active duties of a successful practice of law. A part of this practice calls into play the same faculties which are exercised in composition. Invention is developed in the preparation of arguments to support legal propositions; and in jury trials the imagination may have large and effective scope. The advocate sometimes presents lively pictures to the minds of the jury of facts which he contends have transpired; and this mode of proving that such facts have actually occurred, is often most impressive. Rufus Choate frequently adopted this method of satisfying the jury that certain facts had occurred, by a dramatic sketch of the events and the state of mind

of those concerned in them. Thus, we remember in a trial for perjury, where Choate represented the government, he described the struggle of the culprit's mind when tempted to commit the offence, the memory of his mother's early counsels and prayers making him for a moment hesitate, before he took the fatal step. The oratorical picture, which was deeply impressive, and overwhelmed the jury with conviction that the facts in the criminal's mind did indeed occur as represented, and which secured his conviction, had no other foundation than that a witness had said the defendant hesitated when giving in the testimony alleged to be false. Perhaps no forensic orator could be referred to who brought more of imagination and dramatic representation into the argument even of dry points of law than Choate. Nothing was dry with him. Musty parchments and black letter lore acquired for a moment a charm fresh as spring, when set off with the flowers of his rhetoric. Nor was he less sound and logical, for his exercise of the imagination. An adversary once tauntingly recommended that he should pluck some feathers from the soaring wings of his imagination, and add them to the tail of his judgment, to give steadiness and safety to his oratorical flight. But the verdicts of the jury showed that the orator had carried them with him; and the adversary was as much baffled to answer the subtle reasoning as to do away with the impression which had been made upon the imagination.

Discipline of mind is eminently secured by the study and practice of law; and discipline is as necessary to the success of the poet as of any other artist. It has been fashionable, indeed, to speak of poetry as thrown off without effort in some happy moment. But, in truth, it holds good in this as in any other art, that what is for a long time must be a long time in preparation. "I am long in painting," said the old artist, "for what I paint is to be permanent." The current maxim, *poeta nascitur non fit*, is only half true. "The vision and faculty divine" must indeed be innate; but the fruits of this faculty will be perfect in proportion to discipline and labor. Artists, indeed, do not always acquire culture by the standard routine. "Books in the running brooks" they may have studied more closely than printed volumes; "sermons in stones" more than treatises of theology. But studied they have, deeply and intently, or they never attain to much excellence. What are called self-made and self-taught men must be harder students than others, because they acquire by force of will without the adventitious aids which universities afford. By force of genius a gifted mind may be its own teacher. But to say that learning hurts genius, unless it be inappropriate to the mould in which genius is cast, is contradictory to reason and experience. We should expect, then, the study and practice of the law rather to foster than hinder a poetic bent of mind; for it would furnish ample range for imagination in subtle

invention and in the graphic representations which may be made so telling in a jury argument, as well as in the scope it affords for eloquence, an art very near akin to poetry. Where a man has no poetry in him, we by no means contend that the profession of law is calculated to impart the *afflatus divinus*. But we think there is abundant evidence that when the gift exists it need not be smothered by the law, but may find a scope for itself in adorning legal practice with its own vivid coloring; and it may emerge from the practice of law to the legitimate sphere of poetry, not ill-trained by law experience for the culture of the muses.

Thus we have disposed of one preliminary obstruction to the theory that Shakspeare was an attorney's clerk. It remains to deal with another, consisting of the rival theories, on the one hand, that he was a school teacher, and on the other, that he was a butcher, during the time in dispute.

It must seem strange indeed to the traveller in Stratford-upon-Avon, that these important years of Shakspeare's life should be involved in such obscurity. There is still to be seen his father's house, where the bard was born and brought up. The edifice indeed is not identical in material, the veritable mansion having yielded to the assaults of time; but it occupies the same site, and is of the same style of architecture, and the interior finish the same, if we except the butcher's shop in the basement. We may still walk, too, the long narrow path, with which the poet's feet must have been familiar, conducting to the house of Ann Hathaway's father, which is still standing. The grand interest of all this scene, is, that here England's great dramatist had his birth and early training: and yet the world is divided as to the occupation pursued by Shakspeare as he here entered upon manhood! There is, however, a good deal of negative evidence. Here we know that Shakspeare resided during the years in dispute; for here are the records of the christening of his children. There was no school in Stratford but the endowed grammar school, where he himself had been a pupil. We have a record of its masters, of whom he was not one. There is no trace of any usher having been employed in the school, or of Shakspeare's occupying this position. It is too much to assume gratuitously that the school had an usher, and then to take the farther gratuitous position, that such usher was at one time Shakspeare.

The butcher theory is a figment of the brains of those lovers of the marvellous who delight to make great men, as if by magic, out of the most unpropitious circumstances and the most unsuitable material. A butcher might make a Cromwell, possibly; but we think the scale of possibilities would not admit of a transmutation to the authorship of Romeo and Juliet. We know, too, that Shakspeare's parentage was highly respectable. There is no probability that, in his father's day, a butcher's stall made part of the

family mansion, for the father was one of the aldermen of Stratford and presided over the board. He became, it is true, much reduced in circumstances; but it cannot be doubted that one who had enjoyed his station would be unwilling to make a butcher of his son, and would be much more likely to place him in an attorney's office.

We may now adduce the evidence that Shakspeare was employed in an attorney's office; and this evidence, beyond Nash's libel, already alluded to, consists in the description of law proceedings, the legal phraseology and the reference to legal principles scattered throughout the productions of Shakspeare's pen.

Shakspeare's sketch of Justice Shallow is so truthful a picture, as to be hardly exaggerated or caricatured. The original of that picture is confined to no age, nor even to old England, and is too frequently realized in the assuming wisdom of lay justices in our own land. One would think Shakspeare had tried forty-shilling cases before these worthies, and had striven to beat law into their brains, but found the rebound of the legal points invariably more distressing to himself than effective upon the well-walled cranium of the self-taught magistrate. What lawyer has been so happy as never to try a cause before Mr. Justice Shallow? We think the advocate who has gone through with this painful ordeal, will confess that it is a far easier and less embarrassing task to pilot a cause through our highest courts, presided over by deep and erudite judicial minds, rather than try to furnish eyes to the presumptuous but blind Dogberry or Shallow, or force such stolid brains to comprehend a legal principle. The honesty of the lay magistrate, which very generally no doubt characterizes his judicial proceedings, cannot make amends for his lack of knowledge of legal principles: and legal science the layman cannot possess.

We think nothing of the knowledge Shakspeare evinces in the first scene of the second act of *Taming the Shrew*, of the wager of battle and the signification of the word "craven," as evincing that he studied with an attorney, more than we should of some knowledge of the pugilistic contest as proving a practice in the ring; although the passage in *Taming the Shrew* has been adduced in support of the attorney theory. Not only had the wager of battle become in practice nearly or quite obsolete in Shakspeare's time, but it is of so public a nature, and so calculated to draw the crowd, that its principal features would be generally as well known as the order of a tournament when that martial exercise was in vogue. But such a passage as "Be it known to all men by these presents," from the lips of fair Rosalind, in *As You Like It*, would indicate a habit of legal phraseology cleaving to the pen of the writer. This legal phrase is so out of place in the dialect of a woman, that a

writer would certainly be unlikely to go out of his customary sphere to fetch such an expression.

In the first scene of the third act of the last-mentioned play, the exact technical word for a levy on real estate is used:—

> "Make an *extent* upon his house and lands."

There is an impropriety, it is true, in expressing the *house* in this order; for whenever a house is so detached from land as to be personal property, it is not the subject of an extent, and in other cases it is only an incident to the ownership of real estate, the title to which embraces what is beneath it in converging lines to the earth's centre in the one direction, and *usque ad cœlum* in the other. But that Shakspeare was aware of this familiar legal maxim, appears in the second scene of the second act of *Merry Wives of Windsor*, where Ford says, "I have lost my edifice by mistaking the place where I erected it."

In the second scene of the fourth act of the same play, Shakspeare mentions fee simple with fine and recovery as the strongest species of title, combining as it does the most complete form of grant with the confirmation of a judgment of court. The ex-attorney, in these cases, would seem to flourish a little his law learning, which probably was not half so agreeable to him when reducing its redundancies to parchment, as when laid aside and afterward floating dreamily through the memory of the successful dramatist.

In *All's Well That Ends Well*, Act 4, Scene 3, Parolles says: "He will sell the fee simple of his salvation * * * and cut the entail from all remainders." This refers to the mode of barring the entail by a proceeding in court, which was devised to enable the tenant in tail to convey the estate in fee.

In *Antony and Cleopatra*, Act 1, Scene 4, Lepidus says of Antony:

> "His faults, in him, seem as the spots of heaven,
> More fiery by night's blackness; *hereditary*
> Rather than *purchased*."

Here a peculiarly technical law phraseology is used, which classifies the acquisition of property under two heads; that which comes by inheritance on the one hand, and that acquired in all other modes which is styled "purchase." The last term in the ordinary vernacular, would be confined to property obtained by paying money for it; while the law term would include also a legacy, a gift absolutely gratuitous and without consideration, or founded on a degree of blood relationship constituting a good consideration, or by barter trade, or as remuneration for services. One uninitiated in the law would be exceedingly unlikely to use the term "purchase" in its technical sense, as Shakspeare manifestly does in the passage

cited; because such a use would not only be unknown to general literature, but would actually conflict with the sense of the expression as interpreted in common language. The other word, inheritance, or descent, is nearly as technical: for it not only embraces property which comes down from an ancestor, which sometimes proves a descent indeed; but also an ascent, in cases where the parent is heir of the child.

Hamlet's speech, on taking in his hand what he supposed might be the skull of a lawyer, abounds in legal terminology used in an appropriate sense.

"Where be his quiddets now, his quillets, his cases, his tenures and his tricks? Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? Humph! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries; is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures?"

An acquaintance with the terms of real estate law, and the roundabout processes with which, in England, titles were often perfected, would seldom or never be obtained by the general reader. Not only is this sort of learning distasteful and repulsive, but it is so mazy and difficult of comprehension that even "the soul of Shakspeare," which Tennyson refers to as endowed with pre-eminent intelligence, would find it no easy matter to understand it. The knowledge of it can only be obtained by becoming imbued with it, at the expense almost of a life sacrifice. Unless the waters of this spring be thus deeply drunk, they are bitter to the taste; so that any cursory acquaintance, by way of a literary accomplishment, with the mysteries of this department of law, is out of the question. Had Shakspeare occasionally impressed upon his page a complex figure of trigonometry, had he run his reasoning, at times, in the mould of geometrical demonstration like Spinoza, especially had he now and then broken out in the jargon of algebra, with its A, B, C, and X, we should consider this as satisfactory evidence that he had, in some part of his career, had to do with mathematics, perhaps been a pedagogue, as some of his admirers insist that he in fact was. His knowledge of the terminology of that driest department of all jurisprudence, real estate law, seems a still stronger argument to show that he had some time or other such a familiarity with it as might be acquired by an attorney's clerk. That he learned this lore for amusement is not to be imagined; for real estate law, like vice, is

> "——A monster of such hideous mien,
> That to be hated needs only to be seen."

The knowledge in a superficial way, of other departments of law, with the processes and forms of judicial proceedings, are by no means so satisfactory evidence of professional training, because this knowledge is often impressive and attractive, and is such as would be acquired more or less by every experience, and especially by a quick observer of men and things.

Thus we cannot argue much from such a passage as this in one of Shakspeare's Sonnets :—

> " But be contented; when that fell *arrest*
> *Without all bail*, shall carry me away."

It is indeed a very striking image of the imperative claim of mortality; and implies a knowledge that while some processes admit of bail, in cases of life or death it could not be admitted. Yet to presume that well-informed laymen would be likely to know this item of law, we do not need to appeal to the charitable legal presumption on which the law rigidly insists, that it is known to all men.[1] The same may be said of the following passage in the second scene of the fourth act of *The Comedy of Errors*, in which, to the question " Where is thy master, Dromio? Is he well?" Dromio replies :

> " No, he's in Tartar limbo, worse than hell:
> A devil in an everlasting garment hath him,
> One whose hard heart is buttoned up with steel;
> A fiend, a fairy, pitiless and rough;
> A wolf; nay worse, a fellow all in buff;
> A back-friend, a shoulder clapper, one that countermands
> The passages of alleys, creeks, and narrow lands:
> A hound that runs counter, and yet draws dry foot well;
> One that before the judgment [2] carries poor souls to hell.
> *Adr.* Why, man, what is the matter?
> *Dro. S.* I do not know the matter, he is 'rested on the case.
> *Adr.* What, is he arrested? tell me at whose suit.
> *Dro. S.* I know not at whose suit he is arrested, well,
> But he's in a suit of buff which 'rested him, that can I tell.
> * * * * * * *
> *Adr.* * * * This I wonder at:
> That he, unknown to me, should be in debt.
> Tell me, was he arrested on a *band*?
> *Dro. S.* Not on a band, but on a stronger thing:
> A chain, a chain!

A graphic description might be given of an officer by a layman as well as an attorney. Indeed, the acquaintance of the former with this executive personage is often such as to make a more vivid impression, than on his employer the attorney. Literary men have,

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[1] Ignorantia legis neminem excusat.
[2] An arrest on *mesne process*.

perhaps, had as much familiarity as any class with the men in buff; not, indeed, in a very gratifying way, or as society of their own seeking, if we may judge from the style in which they have photographed the officer in literature, in seeming revenge. Shakspeare's familiarity, in particular, may have sprung in part from his deer poaching adventure, as he was actually pursued by the emissary of law, or pictured the man in buff behind him in his flight to London.

We have thus alluded to Shakspeare's apparent familiarity with the phraseology of law forms, and with processes and officers of justice. We may next advert to his allusions to the courts, where justice was administered. It may be remarked, however, that even a familiar acquaintance with the ceremonials of the courts, which in Shakspeare's day were more imposing than at present, would go but little way to prove a participation in them. A solemnity of interest has always attended the administration of justice, especially in grave criminal cases. Scenes of this kind, where the magistrate is calmly but earnestly applying all the powers of a gifted and learned mind to dealing out the profound and delicate principles of jurisprudence on which hang the issues of life and death, have always proved attractive to every class of observers. This interest was heightened by the impressive paraphernalia of justice, many of which are now abandoned. Shakspeare alludes to some of them in the following lines—

> "Not the king's crown, nor the deputed sword,
> The marshall's truncheon, nor the judge's robe,
> Becomes him with one-half so good a grace
> As mercy does."

The occupation of the dramatist would place the day at his disposal, during much of which he must be observing men and things, to obtain *farrago libelli;* and the courts of justice would be sure to receive their share of his attention. What he then witnessed would impress his mind, and furnish him with a powerful and expressive imagery of thought. The figure of the court of justice, the impartial judge, the suitor with vital interests at stake, has been held up even by inspiration, to convey most impressively upon the mind the divine retribution upon the sinner and the justification of the saint. Secular writers have constantly resorted to the same figure: and hence their pages will often afford evidence of some acquaintance with law proceedings. This has been illustrated in an article in the London Jurist upon Lord Campbell's Treatise on Shakspeare's Legal Acquirements. The writer cites passages from Massinger, and Beaumont and Fletcher, to show that law phrases in Shakspeare are no evidence of legal training. So far as these passages only relate to the public administration of justice, we think the position of the writer in the Jurist is well taken.

Shakspeare's descriptions of law trials do not evidence, we think,

much familiarity with them, and are less impressive than like sketches from the pen of Sir Walter Scott, who actually received a professional education. In Sonnet XLVI. occurs this description of a jury trial between Heart and Eye on a claim of title to a fair lady—

* * *

"My heart doth plead that thou in him dost lie
(A closet never pierced with crystal eyes),
But the Defendant doth that plea deny,
And says in him thy fair appearance lies.
To 'cide this title is impanelled
A quest of thoughts, all tenants to the Heart;
And by their verdict is determined
The clear Eye's moiety, and the dear Heart's part;
As thus; mine Eye's due is thine outward part,
And my Heart's right, thine inward love of heart."

Here Shakspeare sets forth the pleadings which make up the issue, the empanelling of the jury and the verdict. But the sketch is less accurate than the description by Cowper, who was educated a lawyer, of the suit between the nose and eyes, in which the only unwarranted proceeding is the tongue's "shifting his side as a lawyer knows how." Lawyers have been reproached, we hope falsely, with accepting retainers on both sides; but courts have never permitted them to act in this double capacity. Shakspeare calls the allegation of the Heart, who goes forward, the "plea," instead of the declaration; whereas that term is correctly given only to the defendant's averment. He represents the case, too, as a *real* action, whereas the subject of it is the *ideal* of romance, a lady, and so much an affair of fancy that the ownership would hardly constitute real estate. Then the plaintiff is not, as he should be, a demandant complaining of disseisin; but avers that he already has what he brings the action for. The Eye sets up title in himself accompanied with possession. Then for the jury are empanelled the "tenants of the Heart." Here is first an inaccuracy of expression; since "tenant" is the denomination of the defendant in a real action: but what is worse, the tenants derive title from and are the party identical in interest with the Heart, the plaintiff—a gross outrage upon impartial justice. Finally, the verdict is not relevant to the issue framed; but produces a result only pertinent to a suit for partition. We think these considerations make it clear, that if Shakspeare was an attorney's clerk, it did not fall to his lot to frame the pleadings.

Lord Coke, who was as dwarfish in æsthetic sentiment as he was developed in "the perfection of reason," *scilicit*, the law, in charging a Grand Jury, on one occasion, declaimed against dramatists as vagrants. Shakspeare may have been revenging himself for this, when he makes Lear constitute Mad Tom "the robed man of justice," and the fool his "yoke fellow of equity": an association,

by the way, of law and equity judges, which would not occur in England, except in a special commission.

The trial of Othello in the third scene of the first act, is a very irregular proceeding. After the accusation of Brabantio, without waiting to hear Othello, the excited Duke cries—

> " * * the bloody book of law
> You shall yourself read, in the bitter letter,
> After your own sense."

Thus giving the plaintiff *carte blanche* to perform the judicial function of interpreting the law.

We may now advert to law figures and phrases of a general character, profusely scattered through Shakspeare's writings. We do not think, however, that they furnish very satisfactory evidence of his apprenticeship to an attorney. A great writer would not be wholly ignorant of that important department of literature which is made up of law writings, especially of important judicial opinions; and he would naturally be attracted by the terseness and vigor, the forcible and carefully guarded expression, which characterize the best law style; and he would be very likely to transplant some of its terms and figures to his own department.

As specimens of Shakspeare's legal figures and phrases, we may refer to the third scene of the third act of *Othello*, where he says thoughts in the breast

> "Keep leets and law days, and in session sit."

And in the Sonnets he uses the same trope—

> "When to the sessions of sweet, silent thought
> I summon up remembrance of things past."

He often uses the figure of a lease, and denominates the expiration of the term in language of technical accuracy, the *determination*. Thus in the Sonnets—

> "So should that beauty, which you hold in lease,
> Find no determination."

Also—

> "And summer's lease hath all too short a date."

Here the word "date" is not accurately used; as it signifies commencement and not continuance.

In the first scene of the fourth act of *Macbeth*, the figure of a bond is expressively referred to—

> "——— I'll make assurance doubly sure,
> And take a bond of fate."

Here Shakspeare personifies fate as he always delights to, mental abstractions, thus presenting them in picture, and clothing them with vivid reality. This may be noticed as a peculiar charm and an element of power in the graphic style of the immortal dramatist.

In the sixth scene of the fifth act of *King Henry VI.*, Part Third, is the striking figure—

> "Suspicion always haunts the guilty mind;
> The thief doth fear each bush an officer."

In the first scene of the second act of *King John*, the kiss is expressly styled the seal of the indenture—

> "Upon thy cheek lay I this zealous kiss,
> As seal to this indenture of my love."

The force of the seal as imparting strength and solemnity to a contract, is alluded to also in the sacred scriptures. Thus it is said, "He hath set to his seal that God is true": that is, he has adopted this affirmation of God's verity as the motto of his seal, which he is in the habit of using in the most solemn transactions. Christ is also described as sealed by the Father: that is, he had a commission confirmed by the seal of the King of kings. And the New Testament is said to be sealed with the blood of Christ; that is, it derives its validity as a testamentary instrument from the solemnity of this sacred seal. The term "indenture" is very aptly used in the above quotation from Shakspeare, as expressive of the mutuality of love. It was not a mere grant on one side, as is the case with a deed poll, requiring to give effect, only acceptance on the other side. Rather, like the indenture, each party is giver and receiver, and each enters into obligations to the other. In the first scene of the third act of *King Henry IV.*, Part I., the phrase is again appropriately used—

> "And our indentures trepartite are drawn,
> Which being sealed interchangeably," &c.

The peculiarity of the indentures that they are interchangeably delivered, each party being grantor and grantee, is here developed.

We have heard that by a very modern contrivance the condemned criminal may be allowed to furnish a substitute at the gallows: that is to "die by attorney," as in the following quotation from the first scene of the fourth act of *As You Like It*.

> "*Ros.*—No, faith, die by attorney! The poor world is almost six thousand years old, and in all this time, there was not any man died in his own person, *videlicet*, in a love cause."

Here is the principle *qui facit per alium facit per se*, which will apply to facing almost anything. But in *Venus and Adonis* the

phrase attorney is used in its restricted sense, as applicable only to a substitute or agent in a court of justice. Thus—

> "But when the heart's attorney once is mute,
> The *client* breaks as desperate in the suit."

Whatever evidence the foregoing quotations, and many others that might be adduced, furnish of Shakspeare's acquaintance with law forms and phrases, we think he often evinces a want of familiarity with legal principles.[1] So that, if he was a lawyer, we cannot set him down as a good lawyer. His apparent ignorance of law principles is strikingly evinced in the *Merchant of Venice*. A bond is given to the Jew by the merchant for a pound of flesh next the heart; and the Judge feels obliged to give judgment for the flesh, but forbids to take a drop of blood with it, inasmuch as the bond did not so stipulate. Thus the Jew is baffled; and presently he is proceeded against as violating the law by machinations against life. This is throughout a tissue of bad law. To begin with, the grant of the flesh next the heart, if valid, would imply whatever was requisite to obtaining the flesh: for a grant always implies, under the head of appurtenants, whatever is necessary to its usufruct. So that the right to shed blood would be incident to the right to take the flesh; for *incidentum sequitur principale*. But this bond being in contravention of the statute forbidding machinations against life, would be against public policy, and wholly void. This it would be, if there were no such statute. The contract was therefore illegal and void. Finally, in a suit at law to recover the penalty of a bond for a specific article, and not for money, the judgment would be not to recover the specific article, but its measure in money. As the merchant's heart would have no market value in money, the Jew would be jewed in this suit. In an equity proceeding, judgment might be rendered for specific performance: but equity would not enforce an unconscionable contract. So here again the Jew would be nonplussed. The truth is, the heart cannot be so hypothecated as to furnish ground for a suit, except in the court of love.

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[1] Many legal principles, which are not technical, nor necessarily acquired from books, but rather are derived from keen observation and the intuition of genius, of course may be found in the writings of Shakspeare, without leading us to suppose that he learned them in an attorney's office. Thus in *Best on Evidence*, 3d edit., the text states, "So what a person has been heard to say while talking in his sleep, seems not to be evidence against him," and, as authority, he cites *Othello, Act* 3, *Sc.* 3.

> "There are a kind of men so loose of soul,
> That in their sleep will mutter their affairs.
> * * * * * *
> ——— nay, this was but a dream.
> But this denotes a foregone conclusion."

We think, in view of Shakspeare's jurisprudence, that if he was apprenticed to an attorney, his heart was not in the office of his employer, but was roaming in quest of Ann Hathaway, or "chasing the deer." That he was a diligent apprentice to the last named pursuit, we have beautiful evidence in the touching lines addressed to the poor wounded deer, weeping in the stream, in the first scene of the second act of *As You Like It*.

> "——— thou mak'st a testament,
> As worldlings do, giving thy sum of more
> To that which hath too much."

So, too, in the second scene of the fourth act of the *Comedy of Errors*, he describes the officer of justice as

> "A hound that runs counter, and yet draws dry foot well."

One other illustration of Shakspeare's legal acquirements it may be well to advert to—his will; which is supposed to have been drawn up by himself. He left a wife and children. But he remembers one child only in his testament, Susanna, the wife of Dr. Hall, to whom he devises his lands. His wife is only mentioned in the interpolated sentence—"I give to my wife my second best bed, with the furniture." Did Shakspeare expect his wife to accept a legacy so trifling, as to look like an insult in lieu of her dower? Or was he not aware that his wife was entitled to a life estate in one-third of his lands, so that his will, giving the whole to his daughter, could be only partially executed? Again; why did he mention no other child? Was he ignorant that such child not being cut off with a shilling, the law would presume that the omission was through inadvertence, certainly in the absence of controlling proof, and the omitted child could claim as heir as if no will had existed? It would seem that principles so familiar as these, must have been learned by one employed in an attorney's office.

But how shall Shakspeare's frequently correct legal terminology be accounted for, if he was not in the office of an attorney? We think a great, original mind like his, cannot be judged in this respect, like an ordinary person. Faculties like his could rifle sweets from every source, and derive material and gain instruction from all quarters. Emerson has described an original mind as one that draws most largely from the learning and experience of others. Such a writer is not a plagiarist in appropriating the acquisitions of others, because in his mind they take new forms and combinations, and produce new results. The most original mind, if shut out from the world of nature and of books, could produce little or nothing in the form of literature, for lack of material. On these genius feeds; and, without them, starves. It would be as hard to say where

such a writer as Shakspeare got his knowledge, as where a bee got his honey.

We are also to remember that Shakspeare mainly re-wrote old plays, or put romances into the dramatic form. He rebuilt his structures, in a new and beautiful architecture, from old edifices, or ruins, or from material which had belonged to other buildings. How shall we know whether these law phrases were the old brick or the new, which Shakspeare added in his combination? Till we do know this, we can scarcely draw safe inferences from the law phraseology.

It is also important to notice the period in the history of language, in which Shakspeare wrote. Law instruments and pleadings were not as yet couched in English. It would seem that much of this legal phraseology formed at that time a part of the common stock of language; and was not till afterward relinquished to the peculiar province of law by vernacular usage. There has been since Shakspeare's day a division of much language, which was held in common then. Many words have either become wholly obsolete, or lost some of the significations which then attached to them by common usage. Such words occur, in their former sense, only in literary productions of that period, which have not suffered by time. The Bible was then translated; and much of its language has a sense, then general, but now peculiarly scriptural. Shakspeare's phraseology admits of the same observation. Words are now peculiarly Shakspearean, which then belonged to everybody. A comparison of such works as Shakspeare and Saint James' version of the Bible, brings this fact strongly to light; many words being used in both with the same sense, and a signification not now attached to them by general usage. This comparison between the language of Shakspeare and the Bible forms the subject of an interesting article in *The Bibliotheca Sacra* for July, 1862. From such comparison we may be led to infer that in Shakspeare's time many words were in common use which have since become obsolete, except in law language. And, therefore, from the use of legal phrases by Shakspeare, we have not the same reason to infer his acquaintance with law, that we should have if the expressions were used by a writer of the present day; inasmuch as phrases now restricted to law usage may then have been a part of the common vernacular.

We have thus glanced at some items of evidence, and adduced some reasons pertinent to the question, whether Shakspeare was ever the clerk of an attorney. The conviction produced upon our own mind by examining the subject, is, that Shakspeare had a knowledge of real estate forms and phrases, which he might have acquired in the employ of a conveyancer, and would not probably have gained otherwise. We think, however, that he did not take to the business, and never imbued his mind with the great principles

of jurisprudence. He has somewhere made one of his characters declare that it would be well if a young man could sleep away the period of his life, when the wild oats are sown: and we are inclined to think that "glorious Will" was rather reckless at this period of his own career, when we suppose him to have been with an attorney; and that he gave little heed to the grave doctrines of law, while, at the same time, some of its peculiar maxims and phrases indelibly stamped themselves upon his memory. They were such scraps of learning as the unwilling classic scholar carries away from its field, when liberated from constraint, and do not embody those principles which only deep study can master.

We would refer those who may be disposed to pursue further this interesting theme to *Shakspeare's Legal Acquirements* by Lord Campbell, a pleasant and readable disquisition in the simple, direct and attractive style which characterizes the writings of the late Chief Justice of England.

R. F. F.

REMARKABLE TRIALS.

No. I.

LADY WARRINTON'S CASE.

The story of the young Lady Warriston is short and melancholy. She was a daughter of Livingstone of Dunipace, a courtier and a favorite of James VI. An ill-assorted marriage united her at an early age with the Laird of Warriston, a gentleman whom she did not love, and who apparently used her with brutal harshness. The Lady Warriston accused her husband of having struck her several blows, besides biting her in the arm; and conspired with her nurse Janet Murdo to murder him. The confidante, inspired with that half-savage attachment which in those days animated the foster child and the nurse, entered into all the injuries of her dalt (*i. e.* foster daughter), encouraged her to her fatal purpose, and promised to procure the assistance of a person fitted to act the part of actual murderer, or else to do the deed with her own hands. In Scotland, such a character as the two wicked women desired for their associate was soon found, in a groom called Robert Weir, who appears, for a very small hire, to have undertaken the task of murdering the gentleman. He was ushered privately into Warriston's sleeping apartment, where he struck him severe upon the flank-vein, and completed his crime by strangling him. The lady, in the mean time, fled from

the nuptial apartment into the hall, where she remained during the perpetration of the murder. The assassin took flight when the deed was done, but he was afterwards seized and executed. The lady was tried and condemned to death on the 16th of June, 1600. The nurse was at the same time condemned to be burnt alive, and suffered her sentence accordingly; but Lady Warriston, in respect of her gentle descent, was appointed to die by the Maiden, a sort of rude guillotine, imported, it is said, from Halifax, by the Earl of Morton, while Regent, who was himself the first who suffered by it. The printed account of the beautiful murderess contains a pathetic narrative of the exertions of a worthy clergyman (its author) to bring her to repentance. At first his ghostly comfort was very ill received, and she returned with taunts and derision his exhortations to penitence. But this humor only lasted while she had hopes of obtaining pardon through the interest of her family. When these vanished, it was no longer difficult to bring her, in all human appearance, to a just sense of her condition; her thoughts were easily directed towards heaven, when she saw there was no comfort upon earth. It is not for us to judge of the efficacy of repentance upon a death-bed, or at the foot of a gibbet. Lady Warriston's, like that of other criminals, had in it a strain of wild enthusiasm, such as perhaps an assistant may be very naturally tempted to sympathize with. It must indeed seem astonishing with what tenacity a wretch, condemned to part with life, clings to the sympathy of his fellow-mortals, and how readily he adopts the ideas suggested by those who administer the most grateful flattery, if it can be called so, by continuing to express an interest in his desolate condition. Hypocrisy is daily resorted to in cases where it seems utterly useless; nay, it is common to see those, who are under sentence of death for acknowledged crimes, load their souls with deliberate falsehood, only for the purpose of lessening their criminality, in a very small degree, in the eyes of the world they are about to close their eyes upon forever. Spiritual emotions may be, in like manner, feigned and fostered for attracting the approbation or sympathy of a spiritual guide. In all such cases, therefore, as Mr. Sharpe justly concludes, a confessor ought to be severely cautious how he misleads his penitent with too sure a hope, or presents him to the multitude rather as one laying down life like a martyr than a criminal; and in none such can it be safe or decent to follow the example of the Lady Warriston's reverend assistant, who did not hesitate to term his penitent a saint, though the blood of her husband had hardly been washed from her hands.

JURISDICTION OF JUSTICES OF THE PEACE IN CASES OF ASSAULT.

In the part of Best & Smith's Queen's Bench Reports, just published, there is an important case relative to the summary jurisdiction of magistrates in cases of assault. The case to which we allude is *Regina* v. *Elrington*, decided in 1861.[1] The question is, whether, if a person is charged before magistrates with a common assault and battery, and the magistrates dismiss the complaint and give a certificate, according to the provisions of the statute, stating the fact of the dismissal, that dismissal and certificate are a bar to an indictment, in respect of the same facts, for an aggravated assault. To counts in an indictment for an assault "with grievous bodily harm," and an assault "with actual bodily harm," the defendants pleaded that by information and complaint of the prosecutor, they had been brought before justices of the peace upon a charge of a common assault; that the justices, upon the hearing of the complaint, deemed the offence not to be proved, and thereupon dismissed the complaint, and forthwith made out and delivered to the defendants certificates under their hands, in pursuance of the provisions of the statute; concluding by averring that the same assault was the subject of the indictment. To these pleas there were demurrers. The 9 Geo. 4, c. 31, §§ 27–29, gives to the justices three different modes of proceeding. They may convict; or, if they deem the offence not proved, they may dismiss the charge, in which case the party accused is entitled to a certificate of the fact of the dismissal; and, lastly, it is provided by § 29, that in case the justices shall find the assault complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the charge is a fit subject for prosecution by indictment, they shall abstain from adjudicating thereupon. Cockburn C. J. and Blackburn J. (Wightman J. and Hill J., absentibus) decided that the case was within § 28, which provides that when such certificate has been obtained, the party shall be released from all further or other proceedings, civil or criminal, for the same cause, and that these words were express that the defendants were entitled to plead the certificate in bar.

The point decided in this case for the first time came before the court in banc. The question had arisen before in *Regina* v. *Walker*.[2] There, to an indictment charging a felonious stabbing, the prisoner pleaded autrefois acquit before the justices; and Coltman J. ruled that the certificate was a bar to the indictment. In *Regina* v. *Stanton*,[3] the indictment charged an assault with an intent to kill

[1] 1 B. & S. 688; 8 Jur. N. S. part 1, p. 97; 10 W. R. 13.
[2] 2 M. & Rob. 446 (1843).
[3] 5 Cox C. C. 324 (1851). See Anonymous, 1 B. & Ad. 382 (1830).

and murder; and it appearing in the course of the trial that one of the prisoners had been summoned before the justices and convicted of the same assault, ERLE J. considered himself bound to treat the charge as already adjudicated upon, notwithstanding the conviction by the justices had not been pleaded. This case is conclusive on the point in question. The contrary appears to have been held by PATTESON and TALFOURD J. J. at the Gloucester Assizes 1851, in *Regina* v. *Bassett*.[1]

In *Regina* v. *Elrington* the counsel for the prosecution argued that "great public inconvenience would result from holding the plea good. Suppose a party charged before justices of the peace with an assault with intent to commit rape: the justices, acted upon by some influence, might deal with the case under the statute as a common assault, and thus assume a jurisdiction the statute never intended to give them." On this being urged, BLACKBURN J. observed, "If the justices did that maliciously, they would be indictable;" and COCKBURN C. J. in delivering judgment, said, "In the ordinary administration of the law we must not suppose such an outrageous thing as that justices of the peace would act in the manner suggested; and, on the other hand, we must bear in mind the well-established principle of our criminal law, that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

The 9 Geo. 4, c. 31, is but an enactment of the principle of the common law designated by Lord CAMPBELL C. J. in a celebrated case, as a "sacred maxim" of the law, that nemo bis vexari debet pro eâdem causâ.[2] And in the same case he remarked: "It is only the ignorant and the presumptuous who would propose that a man should be liable to be again accused after a judgment regularly given, pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who had been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence."[3]

In Massachusetts, it has been decided that where the jurisdiction of a magistrate for the trial and punishment of an offence depends upon its not being of a high and aggravated nature, without any definite provision by law as to what shall constitute such high and

[1] Reported in Greaves' Crim. Law Consolidation Acts, 71, 2d ed. The author gives it as his opinion, p. 75, that the decision in Regina v. Elrington is clearly right, because it was a case of misdemeanor. Undoubtedly; but the ratio decidedly goes much farther, and would extend to all cases of assault, whether felonious or not.

[2] Regina v. Bird, 2 Denison, 216 (1851).

[3] 2 Denison, 222.

aggravated nature, the assuming such jurisdiction is not conclusive of the offence not being of a high and aggravated nature.[1] And if to a plea of former conviction of an assault and battery, before a justice of the peace, it is replied by the Commonwealth that the assault and battery were of a high and aggravated nature, and it is so found on trial, the plea will be no bar to the indictment.[2] A plea of a former acquittal before a justice of the peace, is a bar to an indictment for an assault and battery, though it charges that "the life of the person beaten was put in great danger."[3] In this case the plea expressly averred that the justice had jurisdiction, and this was not traversed. But the mere fact that the magistrate first ordered a prisoner to recognize to appear to a higher court, but afterwards at the same hearing revoked the order, and sentenced him finally, will not prevent such sentence from being a bar to a subsequent prosecution, the magistrate having jurisdiction to award final judgment.[4]

RECENT AMERICAN DECISION.

Circuit Court of the United States.

First Circuit.—Maine District.

THE BRIG MARTHA WASHINGTON.

ALFRED BLANCHARD ET AL., *Libellants.*

AMOS D. DOLLIVER ET AL., *Claimants.*

1. Every ship or vessel of the United States has a home port, where she must be permanently registered or enrolled. And the record of her transfer, mortgage, or hypothecation, made at the custom-house of the district including such port, is a sufficient compliance with the Act of Congress 29 July, 1850, although at the time of the transfer, &c., the ship or vessel was sailing under temporary documents issued by the collector of another district.

2. The Act of Congress 29 July, 1850, is constitutional and paramount to a statute of a State which provides that a mortgage of personal property, to be valid, must be recorded in the office of the clerk of the town where the mortgagor resides, and renders a compliance with such statute unnecessary.

The facts in the case sufficiently appear in the opinion of the court, by

CLIFFORD J.—This is an appeal in admiralty from a decree of the District Court of the United States for the District of Maine. It was a libel filed in that court to try the title to one-fourth part of

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[1] Commonwealth *v.* Goddard, 13 Mass. 455 (1816).
[2] PARKER C. J. in Commonwealth *v.* Goddard, 13 Mass. 457 (1816).
[3] Commonwealth *v.* Cunningham, 13 Mass. 245 (1816).
[4] Commonwealth *v.* Goddard, 13 Mass. 455 (1816).

the brig Martha Washington. Among other things, the libellants alleged that they were the true and lawful owners of five-eighths of the brig; that the possession of her had, for a long time, been wrongfully withheld from them by the respondents, and they accordingly prayed that process, in due form of law, might issue against the vessel, her tackle, apparel, and furniture, and that the respondents might be cited to appear and show cause why the possession of the brig should not be delivered to the libellants, as having the majority of interest in the vessel. Answers were filed by William Anderson, as master and part owner, and by Phebe J. Flood, Amos D. Dolliver, George H. Coggins, Jacob Anderson, and Ferdinand McFarland. According to the answers, the libellants owned but six-sixteenths of the brig at the time of the filing of the libel, and the remaining interest therein was held as follows, to wit: three-sixteenth parts by Phebe J. Flood, two-sixteenths by Joseph H. Perley, one-sixteenth by William Anderson, one-sixteenth by George H. Coggins, one-sixteenth by Jacob Anderson, one-sixteenth by Ferdinand McFarland, and one-sixteenth by Amos D. Dolliver. Libellants contested the title to the four-sixteenths claimed by Flood and Dolliver, and insisted that the same belonged to them, as set forth in the libel; but the district court held otherwise, and entered a decree for the respondents, dismissing the libel. From that decree the libellants appealed to this court, and the cause having been heard, is now submitted here upon an agreed statement of facts.

By the agreed statement it is admitted that the brig was built in 1853, at Surry, in the collection district of Frenchman's Bay in this State; that when built, and afterwards, on the fifth day of December, 1853, a majority in interest of the owners resided in Trenton and Surry, in that collection district; that on that day she was permanently registered at the custom-house in that district; and that, on the twenty-fifth day of October, 1855, her register, so taken out, was surrendered, and, a majority in interest of the owners still residing at the places aforesaid, she was permanently enrolled at the same custom-house, in due form of law. When those proceedings took place, William Coggins, then living at Surry, but since deceased, owned one-half of the brig; three-sixteenths belonged to William Anderson, the master; and George H. Coggins, Jacob Anderson, and Ferdinand McFarland, each owned one-sixteenth; the residue belonged to the libellants. Pursuing the coasting business, the brig, on the seventh day of December, 1855, was at Norfolk, in the State of Virginia, in charge of her master, William Anderson, who still continued to own three-sixteenths of the vessel, and the master, desiring to proceed on a voyage to the West Indies, caused her to be temporarily registered in the town of Norfolk, within and for the collection

district of Norfolk and Portsmouth. The brig continued to sail under that register during the whole of the year 1856, and most of the succeeding year. On the twenty-seventh day of March, 1856, William Coggins, by a mortgage bill of sale of that date, conveyed three-sixteenths of the brig to Phebe J. Flood, and, on the first day of April following, the same was recorded at the custom-house in Ellsworth, in the collection district of Frenchman's Bay, where the vessel was built. By another mortgage bill of sale, bearing date on the first day of September, 1856, he also conveyed one other sixteenth part of the brig to Amos D. Dolliver, and that bill of sale also was recorded at the same custom-house on the day after its date. Those four-sixteenths of the brig are also claimed by the libellants, under the same William Coggins, by virtue of a mortgage bill of sale executed by him to them on the twenty-first day of November, 1856, which purported to convey to them one-half of the vessel.

Although subsequent in date, the libellants claim title under that bill of sale, on the ground that the mortgages to Flood and Dolliver were not recorded in the proper place. Both of those mortgages were recorded at the custom-house in Ellsworth, in the collection district of Frenchman's Bay, which is the home port of the vessel. Failing to show that the libellants had actual notice of the transfer, as alleged in the answer, the claimants insist that the libellants had constructive notice of the same, because they insist that the bills of sale to them were duly and properly recorded at the custom-house in the district comprehending the port to which the vessel belonged.

Two answers are made by the libellants to the proposition submitted by the claimants. In the first place, they insist that the custom-house at Norfolk, in the State of Virginia, and not the one at Ellsworth, was the proper place for recording the respective bills of sale; and inasmuch as the same were not recorded at the former place, the registry was a nullity, and did not operate as constructive notice of the conveyance.

That proposition proceeds upon the ground that the registry, in every case, of a bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of a vessel, in order to be valid against subsequent purchasers, without actual notice, must be made at the custom-house from which the register or enrolment issued under which the vessel was sailing at the time the instrument of transfer was executed and delivered. But if not, then they insist, in the second place, that the act of Congress of the twenty-ninth of July, 1850 (9 Stat. at Large, 440), is unconstitutional and void, and that their title to the four-sixteenths in dispute is valid, because their bill of sale was duly recorded, pursuant to the state law, in the office of the town clerk, where the mortgagor resided when the instrument was executed.

In considering the first question, which is purely one of construction, it must be assumed that the act of Congress under consideration is valid and obligatory. Referring to the first section of the act, it will be seen that it provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Relying upon the closing paragraph of the section, the libellants insist that the respective mortgages of the claimants were not duly recorded according to that provision; that the proper office for registering the same was that of the collector at Norfolk, from which the temporary register of the vessel issued, and not that of the collector at Frenchman's Bay, where the vessel was built, originally registered, and permanently enrolled.

On the other hand, the claimants insist that by the true construction of the provision, the registry of every such transfer must always be made at the custom-house of the home port of the vessel where the permanent register or enrolment was obtained.

Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be that at or nearest which the owner, if there be but one, or, if more than one, the husband or acting and managing owner, usually resides. Act Dec. 31, 1792, Sec. 3. 1 Stat. at Large, 288. Permanent registry, therefore, as manifestly appears by that provision, is required to be made at the home port of the vessel, and what is meant by the home port is clearly and plainly defined. That requirement is also accompanied by another, which it becomes important to notice in this connection, and which is scarcely less significant than the one recited. Registry must be made at the home port, and the same section provides that the name of the ship or vessel, and of the port to which "she shall so belong," shall be painted on her stern, on a black ground, in white letters of not less than three inches in length: and the owner or owners are made liable to a penalty of fifty dollars for neglecting to comply with that requirement. All persons interested, therefore, have the means of ascertaining the name of the vessel and her home port; and her shipping papers, which include a copy of her register or enrolment, are by law required to furnish the same information. Matters requisite to the registering of any ship or vessel are required to be recorded, and for that purpose the collector of the district comprehending the port to which the ship or vessel belongs, are required to keep, in some proper book, a record or

registry thereof, and to grant an abstract or certificate of the same, according to the form prescribed in the ninth section of the act. Other provisions, also, of the same act, show that every ship or vessel has a home port, and that all persons interested are by law referred to that port for their permanent registers or enrolments.

Citizens of the United States may become the owners of a ship or vessel entitled to be registered, while the vessel is in a district other than the one where the purchaser usually resides; and in that contingency it is provided by the eleventh section of the act that such ship or vessel shall be entitled to be registered by the collector of the district where she may be, at the time of the conveyance; but, in that event, it is provided, that whenever such ship or vessel shall arrive within the district comprehending the port to which she "shall belong," the certificate of registry, which shall have been obtained as aforesaid, shall be delivered up to the collector of such district, who shall, upon compliance with the requisites of the act providing for the registry of ships or vessels, grant a new one in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector, who shall receive the same, to the collector who shall have granted it. These references to the act of the thirty-first of December, 1792, are believed to be amply sufficient to show that every ship or vessel of the United States has a home port, and that her permanent register must issue from, and be recorded in, the office of the collector of such home port, which, by law, is defined to be the port at or nearest which the owner, if there be but one, or, if more than one, the husband or acting and managing owner, usually resides.

Regulations to the same effect are prescribed by the act of the eighteenth of February, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries. 1 Stat. at Large, 305. By the first section of that act, it is provided, in effect, that in order for the enrolment of any ship or vessel, she must possess the same qualifications as are made necessary for registering the same, and the same requisites must in all respects be complied with as on applications for a register. Every licensed ship or vessel is required also to have her name and the port to which she belongs painted on her stern, in the manner as is provided for registered ships or vessels; and if any licensed ship or vessel be found without such painting, the owner or owners thereof are made liable to a fine of twenty dollars. Sec. 11, p. 309. Collectors of the several districts are authorized, by the third section of the act, to enrol and license any ship or vessel that may be registered, upon such registry being given up; or to register any ship or vessel that may be enrolled, upon such enrolment and license being given up, as therein required. Undoubtedly these reciprocal changes may be made upon the application of the master

or commander, when the ship or vessel is in a district other than the one to which she belongs: but, in every such case, the master or commander is required to make oath that, according to his best knowledge and belief, the property of the vessel remains as expressed in the register or enrolment proposed to be given up. Whenever such exchanges are made, it becomes the duty of the collector making the same, to transmit the register or enrolment given up to him, to the register of the treasury; and the same section provides that the one granted in lieu of the one given up, shall, within ten days after the arrival of such ship or vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled; and the master or commander is made liable to a penalty of one hundred dollars if he shall neglect to deliver the register or enrolment and license as therein required. Registers or enrolments, granted under that provision, are temporary in their operation, and consequently are so denominated as contra-distinguished from those granted at the office of the collector of the district where the ship or vessel belongs. Change of ownership, where the new owners reside in a district other than the one to which the former owners, or a majority in interest, of the vessel, resided, will authorize a corresponding change of the home port and of the permanent register or enrolment: but in that case, if the ship or vessel has undergone no alteration in burden since her last registry, it will not be necessary to procure the certificate of a master-carpenter or the surveyor's certificate of admeasurement. When application is made for the new certificate of registry, the former certificate must be surrendered to him for whom the application for such new registry is made, and be by him transmitted to the register of the treasury for cancellation, and it is expressly required that the new certificate of registry shall refer to the prior certificate for the admeasurement of such ship or vessel. Act 31 Dec. 1792, sec. 14, p. 294. Reg. Rev. Law, pp. 17, 18. Act March 2, 1797, p. 498. Corresponding change, of course, must be made in the name of the port to which the ship or vessel belongs as painted on the stern of the vessel, but the name of the vessel cannot be changed under existing laws without Act of Congress. Act January 17, 1859. 11 Stat. at Large, 375. Reference is made to these provisions as showing that ships or vessels, once documented as vessels of the United States, never cease to have a home port while they retain their character as American vessels. Whether sailing under the permanent register or enrolment, issued from the office of the collector of the home port, or under a temporary document, issued from the office of the collector of some other district in the course of the voyage, every such ship or vessel bears upon her stern the name of the port to which she belongs, and although sailing under such temporary document, still it recites the name of her home port and

expressly refers to the permanent register or enrolment, reciting all the material facts upon which the latter was founded. Permanent registers are very properly defined in the treasury regulations as being those granted by collectors to ships and vessels belonging to ports within their respective districts, and, by the same authority, temporary registers are defined to be those granted by collectors to ships and vessels belonging to ports in other districts. Practically, the one is distinguished from the other by the word permanent or temporary, according to the fact, being written in the margin of the document, immediately above the number; but they may also be readily distinguished by their material recitals, as the former is founded either upon the certificate of the master-carpenter and that of the surveyor, or upon the representation of a change in the ownership of the vessel and in the residence of the owners, while the latter is uniformly founded upon the former certificate and the suppletory oath of the master or commander, certifying, among other things, that the vessel is bound on a voyage which necessarily calls for a change of her documents. Such temporary certificates always give the name of the vessel and the name of the port to which she belongs, and clearly they are, in contemplation of law, but temporary substitutes for the permanent documents. No better illustration of the preceding can be found than is furnished by the papers in this case. Desiring to change the employment of the vessel and go on a foreign voyage, the master made and filed in the office of the collector for the district of Norfolk and Portsmouth, the requisite oath to enable him, without returning to the home port of the vessel, to obtain a register in lieu of the enrolment under which she was sailing at the time of the application. Accordingly he made and subscribed an oath, stating the names of the owners, the proportion owned by each, the name, the place where and the time when she was built, the port to which she belonged, and that she was bound on a foreign voyage; and referred to her permanent enrolment to confirm his statements. Having made oath to those facts, and given the bond required by law, the temporary register was issued by the collector; and clearly it was but a temporary substitute for the permanent enrolment which was surrendered. Documents of permanent character are granted to ships and vessels built or owned by citizens of the United States, to confer upon them the character of American vessels, and to secure to their owners the benefits and privileges belonging to vessels entitled to that designation.

Temporary registers or enrolments are authorized by law, in the course of the voyage, at the ports of districts other than the one where the vessel belongs, as matter of convenience to the owners; to save the loss of time and the expense which must otherwise be incurred by a return of the vessel to her home port, merely for the

purpose of changing her papers. Permanent documents, whether registers or enrolments, are uniformly granted at the home port; but temporary ones are never granted except when the vessel is in the port of a district other than the one to which she belongs; and hence the requirement that the former shall be recorded in some proper book to be kept by the collector, granting the same. No such requirement is made regarding the latter; but the provision is, that the collector to whom the register or enrolment and license may be given up, shall transmit the same to the register of the treasury, and the register or enrolment and license, granted in lieu thereof, shall, within ten days after the arrival of the vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled. Registry of bills of sale of ships or vessels surely need not be recorded in more than one office, and the unbroken practice of seventy years points to the office of the collector of the home port as the proper place for such registry, and consequently as the one contemplated by the act of Congress under consideration. Every ship or vessel regularly documented is registered or enrolled at the port of the district where she belongs; and that remark is correct, although she may be sailing under a temporary register or enrolment granted at the office of the collector of some other port. Such a temporary document always refers to the permanent one, and is founded upon it, and indeed would be of no validity if the permanent one did not exist. Confirmation of this construction is derived from the language of the second section of the act. Collectors of customs are required by the second section to record the bills of sale, mortgages, hypothecations, and conveyances mentioned in the first section, and also all certificates for discharging and cancelling any such conveyance, in a book to be kept for that purpose, in the order of their reception. They are also required to note in said book and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received, and to certify on the instrument of conveyance or certificate of discharge or cancellation the number of the book and the page where recorded. 9 Stat. at Large, p. 440. Notice, undoubtedly, is one of the objects of these requirements, in order to prevent fraud upon subsequent purchasers or incumbrancers. But let it be conceded that the views of the libellants are correct, and it at once becomes obvious that the requirements are substantially useless; a compliance with them would seldom or never accomplish the object for which they were enacted. Ships or vessels, absent from the home port, may change their papers at any other one of the hundred and fifty custom-houses established under the revenue laws of the United States. Such changes occur, of course, while the vessel is absent from the port of the district to which she belongs, and in many instances without the knowledge of

those owning a majority in interest of the vessel. Purchasers, under such circumstances, would hardly find it practicable to make search at all the custom-houses in the United States, in order to learn the state of the vessel's papers; and unless they did so, the dishonest vendor, on the theory of the libellants, might easily secure the fruits of a second sale. Congress, it is believed, could not have intended to adopt any such theory; and in view of all the provisions of law upon the subject, I am of the opinion that the office of the collector at the home port is the proper place for the registry of any such bill of sale, mortgage, hypothecation, or conveyance within the meaning of the act to provide for recording the conveyances of vessels and for other purposes.

2. Congress, by the express words of the Constitution, has power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Able counsel maintained, in *Gibbons* v. *Ogden*, 9 Whea. 3, that the power of Congress in this behalf was limited to the interchange of commodities, and that it did not comprehend navigation. Responding to the argument on that point, MARSHALL C. J. said, if commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised with the consent of all, from the commencement of the government, and has been understood by all to be a commercial regulation. "All America," says the late Chief Justice, "understands and has uniformly understood the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed;" and finally he affirms that the power to regulate navigation is as expressly granted as if that term had been added to the word commerce. But the case of *Sinnot et al.* v. *Davenport*, 22 How. 242, is more directly in point, and perhaps ought to be considered as decisive of the question. On that occasion the court had under consideration the question whether a law of the state of Alabama requiring owners of steamboats navigating the waters of the state to file, in the probate office of the county of Mobile, a statement specifying the name of the vessel, the name of the owner or owners, his or their place of residence, and the proportion owned by each, was or not constitutional; and the court unanimously held that it was not, because it was in conflict with the law of Congress providing for the registering and enrolling of vessels. Speaking directly upon the question involved in the case, the court say, "Congress therefore has legislated upon the very subject which the state law has undertaken to regulate, and has limited its regulation *in the matter to a registry at the home port.*"

That opinion was given in 1859, more than eight years after the act of Congress in question was passed.

Undoubtedly the means of ascertaining the names and citizenship of the owners of ships and vessels, and of perpetuating and authenticating the evidence thereof, are regulations of commerce within the meaning of that term as defined by the decisions of the supreme court, and if so, then it clearly follows that the requisitions of Congress are paramount to those enacted by the state.

For these reasons, I am of opinion that the provision of the act of Congress under consideration is valid, and consequently that the decree of the district court must be *affirmed*.

Fessenden and *Butler* for libellants.

Shepley and *Dana* for claimants.

RECENT ENGLISH CASES.

REGINA v. LUNDIE.—Jan. 24 and 28, 1862.

Divisibility of By-Law.

One of the by-laws made by the "pasture masters" of the common pastures of the borough of B., under the 6 Will. 4, c. lxx. passed to provide for the proper regulation thereof, provided that "if any person shall stock or depasture, inter alia, a vicious horse on any part of the common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the said stock and cattle, shall respectively forfeit and pay for every such offence the sum of 5*l.*:"

Held, that so much of the by-law as referred to the infliction of the fine upon the person actually transgressing the same was divisible from that portion which referred to the owner of the stock; that the former part of the by-law was reasonable and good, and might stand independently of the latter, which, if bad, might be rejected.

Under the provisions of the 6 Will. 4. c. lxx. § 34, the "pasture masters" of the borough of Beverley (officers appointed under the act) are empowered to make by-laws for the regulation and management of the common pastures of the said borough. By the seventh of such by-laws it is provided, that "if any person entitled to stock or depasture the said common pastures shall stock or depasture the same with," inter alia, "any vicious horse, in every such case the person or persons so offending, and the owner or owners of the said horse, shall respectively forfeit and pay for every such offence the sum of 5*l.*, to be levied and recovered according to the form of the statute in that behalf." On the 13th June, 1860, a pony belonging to the defendant, then depasturing in one of the

said common pastures, was impounded by the neatherd, upon the ground that the said pony had kicked and broken the leg of a mare, the property of another of the pasture freemen. On the 16th the defendant caused his pony to be again turned into the common pasture; and on the 18th a meeting of the pasture masters of the said borough was held, when a fine of 5*l*. was imposed upon him for having so a second time depastured his said pony. On the 19th notice was served upon the defendant of the imposition of such penalty of 5*l*., and that unless the same should be paid to the treasurer of the pasture masters on or before the 29th, application to the justices of the peace, for the purpose of obtaining a summons to enforce payment, would be made. The penalty being unpaid, the defendant, on the 16th July, was convicted of the above offence before two of the justices of the peace for the said borough. The conviction was as follows:—

"Borough of Beverley, in the county of York, to wit.—Be it remembered, that on the 16th July, 1860, William Robert Lundie, of Hull-bridge-road, in the said borough of Beverley, attorney's clerk, is convicted before us, J. M. R. and T. C., Esqrs., two of her majesty's justices of the peace for the said borough of Beverley, for that the said William Robert Lundie, after the passing of a certain act of Parliament made and passed in the sixth year of the reign of his late Majesty King William IV., intituled 'An Act to provide for the better Regulation of certain Common Pastures within the Borough of Beverley, in the East Riding of the County of York,' on the 17th June, 1860, being a pasture freeman of the said borough, and entitled to stock the said common pastures, and being the owner of a certain vicious horse, did depasture the same in one of the said common pastures, to wit, Westwood and Hurn, for which offence we do adjudge the said William Robert Lundie to have forfeited the sum of 5*l*. Given under our hand and seal, &c.

"J. M. R.
"T. C."

Against this conviction the said William Robert Lundie appealed to the next general quarter sessions, when the said conviction was confirmed, with costs.

Thompson had obtained a rule calling on the prosecutors to show cause why a writ of certiorari should not issue to remove into this court the said record of conviction, and the subsequent order of sessions, to be quashed for the insufficiency thereof; against which,

Field now showed cause.—It is contended on the other side that the by-law, which provides that "if any person entitled to stock or depasture the said common pastures shall stock or depasture the same with a vicious horse," inter alia, "then, and in every such case, the person or persons so offending, and the owner or owners of the said stock, &c., shall *respectively* forfeit and pay for every

such offence the sum of 5*l.*," &c., is unreasonable, and therefore bad. Assuming that part of the by-law which imposes a penalty upon the owner to be open to the objection taken, it is clear that the word "respectively" effectually separates the two portions of the by-law, and that the remainder, being good, may stand alone. Upon this point *Rex* v. *Faversham*, 8 T. R. 352, is an authority. There Lord KENYON C. J. says, in his judgment, "Though a by-law may be good in part and bad in part, yet it can be only so where the two parts are entire and distinct from each other." (*Fazakerley* v. *Wiltshire*, 10 Mod. 338.)

Thompson, in support of the rule.—The seventh by-law is unreasonable, and therefore bad. Its effect is to impose a penalty not only upon the pasture freeman, but also upon the owner of a horse, who may be perfectly innocent and ignorant of the offence, and may in all probability be a job-master in some distant town. It is tantamount to saying that two persons are to suffer for the offence of one. [CROMPTON J.—The by-law does not inflict two penalties on the same person.] But it is not divisible, any more than though it were to the effect that a man should pay 5*l.* and be imprisoned. The case of *Rex* v. *Faversham*, therefore, cited on the other side, does not apply. Com. Dig. By-law, C. 7, recognized by WATSON B., in his judgment in *The Blackpool Board* v. *Bennett*, 4 H. & N. 137, and *Ellwood* v. *Bullock*, 6 Ad. & El. 383, are in point. Here the words of the by-law are, "then and in every such case" the forfeiture shall be inflicted—expressions which evidently relate to both classes of persons therein mentioned. [COCKBURN C. J.—If this were the case of an innocent owner, I should better appreciate your argument.]

COCKBURN C. J.—I am of opinion that the conviction is good. With respect to the main question in this case, as to the divisibility of the by-law, I think it must be taken that where a by-law is good in part and bad in part, the objectionable portion may be rejected, and the remainder retained and acted upon. Cases have been cited in which it is contended that the Courts have arrived at a contrary decision; but I am, nevertheless, disposed to think that every case must stand on its own merits. Here the by-law is to the effect that if any person, entitled to stock or depasture the common pastures, shall stock or depasture the same with, amongst other things, a vicious horse, in every such case the person so offending, and the owner thereof, shall respectively forfeit and pay for every such offence the sum of 5*l.*, to be levied and recovered according to the form of the statute in that behalf. It has been contended that this by-law is unreasonable, because the owner of such an animal might innocently, and without knowledge or intention, be brought within its scope, and become liable to the penalties thereby imposed. But, admitting so far the justice of this objection, it seems to me that we

may, consistently with the authorities, reject this portion, and act upon the remainder of the by-law, which is perfectly good and reasonable. I think, therefore, the conviction should stand.

WIGHTMAN J.—Having heard but little of the argument, I decline to offer any opinion.

CROMPTON J.—I am also of opinion that the conviction is good. With respect to the by-law, I am of opinion that it is divisible, and that the unobjectionable portion of it may be retained and enforced; and I was much struck with Mr. Field's observation, that the word "respectively" effectually and entirely separates the two classes of offenders, and makes the penalty applicable to either. The passage in Comyns' Digest, relied upon by Mr. Thompson, must be held, I think, to apply to those cases where a by-law is in its nature indivisible; there, undoubtedly, if bad in any particular, it must be held to be bad altogether; but, for the reasons I have stated, this rule is here inapplicable.

MELLOR J.—With respect to the by-law, I agree with the rest of the Court that the word "respectively" effectually separates the good from the bad portion of the by-law, and that, viewed in this light, the passage cited in Comyns' Digest is consistent with our decision.

Rule discharged.

In Austin *v.* Murray, 16 Pick. 121, 126 (1834), the court held that a by-law being entire, if it be void in part, shall be void for the whole, citing Com. Dig. By-law, C. 7, and Rex *v.* Faversham, 8 T. R. 356, but neglected to notice the qualification of the rule as laid down in Rex *v.* Faversham, that if the good part is independent and unconnected with the bad, the good part is valid and binding.

Appeals from the Court of Exchequer.

Before WIGHTMAN, CROMPTON, BLACKBURN, WILLIAMS, WILLES, BYLES, and KEATING, JJ.

SARAH JONES *v.* DAVIES ET UX.—Nov. 30, and Dec. 2, 1861.

Ejectment—Husband and wife—Merger of terms—Term in the husband, then the fee coming to the wife—Tenancy by the curtesy initiate.

Where, the husband being tenant for years of lands, the fee comes to the wife, there being issue of the marriage, the situation of the husband is tenant by the curtesy initiate; and the term does not, during the wife's life, merge, either in his estate as such tenant by the curtesy initiate, or in the estate which he has in the lands in right of his wife.

This was an action of ejectment for a messuage, farm, and lands situate at Crastock and Sutton, in the county of Surrey. At the trial, before BLACKBURN J., at the Croydon Summer Assizes, 1859, the facts material to this report were these:—On the 22d September, 1844, the male defendant Davies became lessee of the property

in question for twenty-one years from Michaelmas then next, at the yearly rent of 70*l.*, and entered into possession, and continued so down to this time. Afterwards the lessor devised by his last will to Mrs. Davies, the female defendant, the same property in fee, charged with an annuity to John Jones (since deceased) and Sarah his wife (the testator's daughter), and the survivor of them, with power of entry in case of non-payment. The testator died in May, 1849. The defendants have several children, issue of their marriage. The annuity being in arrear, Sarah Jones, the plaintiff, under the above power of entry, brought the present ejectment. The learned judge directed a verdict for the defendants, reserving leave to move to enter the verdict for the plaintiff, on the ground that the term granted to the male defendant had merged. A rule nisi having been obtained accordingly, was finally discharged by the Court of Exchequer, and from that decision the plaintiff below now appealed.

Nov. 30.—*Garth*, for the appellant, cited Co. Litt. 29. a., 30. a., 67. a., 124. b.; Wms. Exors. 536; Sugd. V. & P. 505, 13th ed., *Platt* v. *Sleap*, 1 Bulst. 118; Year Book, 18 Edw. 3, fol. 29; and 3 Prest. Conv. 205, 279. [BLACKBURN J. referred to Co. Entr. Quare Impedit, fol. 520; and to *Parry* v. *Hindle*, 2 Taunt. 180. WILLIAMS J. cited *Lord Clanricarde* v. *Lord Lisle*, Hob. 1[1]. WILLES J. referred to *Barnfeather* v. *Jordan*, 1 Dougl. 452.]

WIGHTMAN J.—On the 2d December we will either give judgment, or hear Mr. Brown on the other side.

Dec. 2.—The judgment of the Court was now delivered by

WIGHTMAN J.—We are of opinion that the judgment of the Court of Exchequer in this case was correct, and that there was no merger of the term of twenty-one years created by the lease to Davies; but that it is still subsisting, and a bar, as long as it exists, to the plaintiff's right of entry. It is clear, upon the authorities referred to upon the argument, that the devise in fee to the wife, subsequent to the lease for years to the husband, would not operate as a merger of the term, because the husband would have the term in his own right, and the freehold in right of his wife; and that to create a merger, the term and the freehold must exist in one and the same right. It was said, indeed, that if the freehold was acquired by the act of the husband himself, and not by operation of law, there might be a merger. However this may be in some cases, there appears to us to be no ground whatever for the argument, that in this case the husband acquired an estate of freehold by his own act. The estate was devised to his wife in fee, and no act was required on his part to make it vest in him and his wife, in right of the wife. Whether he assented or not, provided he did not assent,

[1] See Rastell's Entr. Replevin and Avowry, 366 a.

the estate would vest, as appears clearly from the passage in Co. Litt. 3. a., cited in the case of *Barnfeather* v. *Jordan*, 2 Dougl. 451. It was further contended, for the plaintiff, that even if the estate in fee devised to the wife would not operate to merge the term for years previously granted to the husband, he had acquired an independent and separate estate of freehold in himself as tenant by the curtesy, in which the term would merge. We are, however, of opinion, in accordance with that of the Court of Exchequer, that whatever might have been the case had the wife died, the husband during her life has not such an estate of freehold in his own right as would merge the term. It is only upon the death of the wife that the husband becomes tenant by the curtesy in the proper sense of the term. It is said in Co. Litt. 30. a., that four things belong to an estate of tenancy by the curtesy, namely, marriage, seisin of the wife, issue, and death of the wife. During the life of the wife he is only what is called "tenant by the curtesy initiate," and as such is respected in law for some purposes, which are enumerated by Lord Coke; but he is not tenant by the curtesy "consummate," so as to give him a separate and independent estate of freehold until the death of the wife; and we are not aware of any authority for holding, that, until the death of the wife, a tenancy by the curtesy "initiate" would be such an estate of freehold in the husband, separate from and independent of the estate in fee of which he and his wife were seised in right of the wife, as would merge the term. The judgment of the Court of Exchequer, therefore, will be affirmed.

Judgment affirmed.

GALLIARD, App. LAXTON, Resp.—Feb. 14, 1862.

Peace officer—Arrest—Warrant, production of—Civil proceeding—Information, withdrawal of—Effect of withdrawal.

A peace officer, making an arrest under a justice's warrant in a civil proceeding, is bound to have the warrant in his possession at the time, in order that it may be produced if required.

Where two informations were laid against a person, the first charging a rescue by him of one in custody, and the second an assault upon the police, and at the hearing before the justices the former was withdrawn—*Held*, that the assault, as the lesser offence, was not merged in the rescue; and that, the first information having been abandoned, the defendant might well be charged upon the second.

Case stated for the opinion of this court under the 20 & 21 Vict. c. 43:—"On the 3d July, 1861, two informations were laid before a magistrate of the county of Chester against the appellant, the first of which was as follows:—

"'County of Chester, to wit.—The information and complaint of Charles Laxton, of the township of Nantwich, in the said county of Chester, superintendent of police' (the respondent), 'taken and made upon oath this 3d day of July, in the year of our Lord 1861, before me, the undersigned Thomas Brook, clerk, one of her Majesty's justices of the peace in and for the said county, at the township of Wistaston, in the said county of Chester; who saith that he hath just cause to believe and suspect, and doth believe and suspect, that Charles Galliard, John Galliard, Louisa Galliard, and Margaret, wife of Charles Galliard, of the township of Monks Coppenhall, in the said county, on the 1st day of July, in the year aforesaid, at the township of Monks Coppenhall aforesaid, whilst one William Galliard was in the lawful custody of one Henry Dyson, a constable, under and by virtue of a warrant under the hand and seal of Thomas Brook, clerk, one of her Majesty's justices of the peace in and for the said county, for arrears in bastardy, unlawfully, forcibly, and feloniously did rescue the said William Galliard out of the custody of the said Henry Dyson, and him, the said William Galliard, did put at large, to go whithersoever he would, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity; and thereupon this informant prayeth that the said Charles Galliard, John Galliard, Louisa Galliard, and Margaret Galliard may be apprehended for their said offence, and dealt with according to law. Sworn, &c.

(Signed) "'CHARLES LAXTON.
"'THOMAS BROOK.'

The second information was as follows:—

"'County of Chester, to wit.—Be it remembered, that on the 3d day of July, in the year of our Lord 1861, at Wistaston, in the said county of Chester, Charles Laxton, of Nantwich, in the said county of Chester, superintendent of police, personally cometh before me, Thomas Brook, clerk, the undersigned, one of her Majesty's justices of the peace in and for the county of Chester, and upon his oath informeth me, upon information received, that Charles Galliard, John Galliard, Louisa Galliard, and Margaret, wife of Charles Galliard, of the township of Monks Coppenhall, in the said county of Chester, within the space of three calendar months now last past, to wit, on the 1st day of July, 1861, at the township of Monks Coppenhall, in the said county of Chester, unlawfully did assault Henry Dyson and John Sharman, of Monks Coppenhall aforesaid, police constables, contrary to the form of the statute in such case made and provided; wherefore the said Charles Laxton prayeth the consideration of me, the said justice, in the premises, and that the said Charles Galliard, John Galliard, Louisa

Galliard, and Margaret Galliard may be apprehended and brought to appear before me, and answer the premises, and make their defence thereto. Taken and sworn before me, &c.

(Signed) "'CHARLES LAXTON.
"'THOMAS BROOK.'

Upon both of which informations warrants were issued, and the defendant was brought up before the undersigned magistrate on the 5th July, 1861, at a petty session held at Nantwich, when the complainant withdrew the information No. 1, but proceeded with the information No. 2, when it was proved by evidence that a warrant for arresting William Galliard, the defendant's brother, was issued on the 8th September, 1861, and was as follows:—

"'County of Chester, to wit.—To the constable of the township of Nantwich, in the county of Chester, and all her Majesty's officers of the peace in and for the said county whom these may concern.—Whereas information and complaint have been made upon oath before me, Thomas Brook, clerk, one of her Majesty's justices of the peace for the county of Chester, on the 8th day of September, 1860, by Eliza Lowe, of the township of Nantwich, in the county of Chester, single woman, that by an order made under the authority of the statute passed in the eighth year of the reign of her present Majesty, intituled "An Act for the further Amendment of the Law relating to the Poor of England," at the petty sessions holden in and for the division of the hundred of Nantwich, in the county of Chester, on the 7th day of August, 1860, by her Majesty's justices of the peace in and for the said county, acting in and for the said division, then and there assembled, William Galliard, of the township of Monks Coppenhall, in the county of Chester, puddler, was adjudged to be the putative father of a bastard child then lately born of her body; and that in and by the said order it was ordered that the said William Galliard should pay to her, the said Eliza Lowe, so long as she should live and should be of sound mind, and should not be in any gaol or prison, or under sentence of transportation, or to such person who might be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of 1*s.* 6*d.* per week until such child should attain the age of thirteen years, or should die, or she, the said mother, should marry, and the sum of 5*s.* for the midwife, and the sum of 2*l.* 4*s.* for the costs incurred in the obtaining such order; and that the said William Galliard hath had due notice of the said order; and that the said bastard child is now living, under the age of thirteen years; and that she, the said mother, hath not been married since the said order was made; and that the payments directed to be made by the said order have not been made according thereto by the said William Galliard, and that there is now in arrear for the same the sum of

19*s.* 6*d.*, being the amount of arrears for thirteen weeks' payments, and 5*s.* for the midwife, and the sum of 2*l.* 4*s.* for the costs incurred in the obtaining such order: these are, therefore, in her Majesty's name, to command you, the said constable or other officer of the peace, or some or one of you, forthwith to apprehend the said William Galliard, and convey him before two of her Majesty's justices of the peace in and for the said county of Chester, to answer the premises, and to be dealt with according to law.

"'Given under my hand and seal, at the township of Nantwich, in the county of Chester, this 8th day of September, 1860.

(Signed) "'THOMAS BROOK.'

Which warrant was given to the superintendent of police, and by him given to the police at Monks Coppenhall, and it had been for a time in the possession of police constable Dyson. On the night of the 1st July police constables Dyson and Sharman, being on duty in uniform, as constables, in Monks Coppenhall, arrested the defendant's brother, the said William Galliard, under the warrant dated the 8th September, 1860, but they had not the warrant in their possession at the time, it being then at the station-house in Monks Coppenhall, in the possession of their superior officer, Inspector Wilson. After complainant's witnesses had been examined, the attornies for the defendant took the following objections—first, that the arrest was illegal, the warrant of the 8th September, 1860, not being in the possession of the police constables when the arrest took place; secondly, that the complainant, having withdrawn the charge of rescue, could not proceed with that for the assault, as the lesser offence merged in the greater one, and that the withdrawal amounted to an acquittal, on the principle of autrefois acquit, and that he could not be re-tried for the same offence. We were satisfied that the assault had been committed, and that the objections were not tenable, and we convicted the defendant in 5*l.*, including costs, and in default to be committed to Chester Gaol for two months. The defendant's solicitors applied for a case on the two points of law, under the 20 & 21 Vict. c. 43, and we agreed to grant the same, and submit for the opinion of the Court of Queen's Bench—First, whether, the warrant of the 8th September, 1860, having been issued in the form above set forth, and being in the hands of the police, an inferior officer of the same force, not having the warrant in his actual possession at the time of the arrest, was legally justified in arresting William Galliard? Secondly, whether the information No. 1 being withdrawn amounted to such a trial and acquittal that the defendant could not be tried on the information No. 2?"

Gibbons, for the appellant.—The arrest was illegal, and the conviction cannot be supported. In Dalton's Office of the Sheriff, 110, it is said, "A sworn and known officer (be he sheriff, undersheriff,

bailiff, or sergeant) needs not to show his warrant or writ when he cometh to serve it upon any man's person or goods, although the party demandeth it; but a special bailiff, or other person who is no sworn or known officer, must show their warrant to the party if he demands it, or otherwise the party may make resistance, and needs not to obey it; and so of the sheriff's servant or undersheriff's servant, being no sworn bailiff; they cannot arrest a man without showing their warrant if it be demanded; and yet no special bailiff is bound to show his warrant without demand thereof." It seems, therefore, that to constitute a legal arrest under a warrant, the officer must have it in his possession at the time, ready to be produced if required; and that, so far as his duty is concerned, it is immaterial whether production be demanded or not. The law as touching arrest in cases of felony is thus laid down in Lambard's Eirenarchia, book 2, c. 6, p. 177:—"There is one other thing also whereof I thought meet to admonish our justice of the peace in this place. Many of them doe use to giue out their precepts to attach persons suspected of felony, to the ende to haue them brought before them; which thing is neither newly devised by them, nor done without color, for they haue such a precedent in the olde booke of Justices of the Peace, fol. 41. And there is no doubt but that if a felonie be done, euerie man may arrest whomsoever he suspecteth of it. But for all that, the whole Court (14 Hen. 8. c. 18) condemneth such precepts; because, if the bailife which serueth the warrant have suspition in the partie, hee may of himselfe (without the warrant) arrest him; and if he haue not, then is the warrant of a justice of the peace no warrant to arrest him unlesse hee be indited before." In *Robbins* v. *Hender*, 3 Dowl. 543, the Court seem to have intimated that had the warrant been produced (which was not done), the other circumstances of that case would have constituted an arrest. In *Fownes* v. *Stokes*, 4 Dowl. 125, it was sought to discharge the defendant out of custody, upon the ground, amongst others, that the officer who arrested him had not at the time the warrant in his possession. [WIGHTMAN J.—There the Court declined to assist the defendant, inasmuch as, having been arrested on the 12th May, he took no steps for procuring his discharge until the 4th June. That case will hardly help you.] *Broadfoot's case*, Fost. Crown Law, 145, referred to in 1 East's P. C., 307, is illustrative of the law upon the question. There, a merchant seaman being indicted for the murder of one of a press-gang, FOSTER J. (then recorder of Bristol), held the offence to amount to manslaughter only, it appearing that the press-gang, contrary to the terms of the Admiralty warrant, was unaccompanied by a commissioned officer. So in *Dixon's case*, referred to in 1 East's P. C. 313, where a person resisting a press-gang was struck and killed by one of them, it was held, no officer being present, to be murder.

Rex v. *Whalley*, 7 Car. & P. 245, is also in point. There the commissioners of bankrupt issued a warrant to apprehend a bankrupt, directed "to J. A. and W. S., our messengers, *and their assistants:*" held, that the warrant did not justify the apprehension of the bankrupt by an assistant, who was not at the time in the presence, actual or constructive, of J. A. or W. S., although he (the assistant) had at the time the warrant in his possession. He cited also *Rex* v *Patience*, 7 Car. & P. 775, and *Hooper* v. *Lane*, 6 H. L. C. 443; S. C., 3 Jur., N. S., 1026.

Secondly, it is submitted that the withdrawal of information No. 1 amounted to such a trial and acquittal that the defendant could not be tried on No. 2.

PER CURIAM.—We think the latter objection untenable; but upon the first point we will take time to consider.

No counsel appeared for the respondent.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN J.—The first question proposed to us is one of much general importance, inasmuch as it may arise in cases where resistance to an arrest may be carried to the extent of wounding or even killing the officer. It appears that a warrant had been made by a magistrate for the county of Chester, directed "to the constable of the township of Nantwich, and all her Majesty's officers of the peace in and for the said county," commanding them, or some or one of them, forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for not obeying a bastardy order for payment of moneys. This order is stated to have been given to the superintendent of police, and by him to have been given to the police at Monks Coppenhall, in the county of Chester (of which place William Galliard is stated in the warrant to be an inhabitant), and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard, but he had it not with him at the time he made the arrest, it being then at the station-house at Monks Coppenhall, in the actual possession of the superintendent there. On the night of the 1st July last, Dyson and another police constable of the county arrested William Galliard under the warrant, but did not produce it; and the question is, whether, to make the arrest legal, they must at the time have had the warrant with them, ready to have been produced if necessary. The warrant is not addressed to any officers by name, but to the constable of Nantwich, and all the peace officers of the county generally; and this general form of direction seems to be warranted by the 5 Geo. 4, c. 18, s. 6; and Dyson and the other policeman both came within the description of the persons to whom it is addressed. We are not told what words

were used by the officers at the time they made the arrest, but as no point seems to have been raised upon any omission to inform William Galliard of the nature of the proceeding, it may be presumed that they did tell him not only that they arrested him under the warrant, but what the charge was. As they were obviously police constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest, but that as this was not a charge of felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced if required, and that an arrest without such production would not be legal. The production of the warrant was not, however, required before or at the time that the arrest was made, notwithstanding the resistance of the appellant and his brother, nor indeed at any time; and as the warrant was in existence at the station, where, no doubt, it could readily have been procured, it may be said that there was no reason for its being in the hands or the pocket of one of the officers, and no disadvantage to the person arrested by reason of its not being there. That, no doubt, may be so under the circumstances which occurred in this case; but suppose it had happened that after the arrest had been effected, in spite of the resistance made, and before the appellant's brother had been taken to the station, where the warrant was, he had requested the officers to produce it, which, not having it, they could not do, how would the case have stood then? We have already expressed our opinion, that, if requested, the officers are bound to produce the warrant; and if so, the keeping in custody after such request and non-compliance would not be legal; and it can hardly be contended that the arrest itself could be legal, though the detention, under the circumstances above supposed, would be illegal; and in this view of the case it appears to us that the officers were bound to have the warrant ready to be produced if required, and that if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed; and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed, from the allegation of delivery to them, that they continued to hold it. The case of *Mackalley*, 9 Rep. 69 a., is distinguishable, on the ground suggested by Mr. East in his treatise on Pleas of the Crown, vol. 1, p. 319, citing Hale's P. C., 458; and, indeed, we are unable to find any case in which the precise point raised for our consideration has been decided; but we are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them, ready to be produced in case it was required,

and that, not having it, they were not justified in making the arrest.

As to the second point, we are clearly of opinion that the withdrawing the information for a rescue afforded no valid ground of objection to the proceeding on the information for an assault.

Conviction quashed.

LEGAL NOTES AND ANECDOTES.

A story is told of one Smith who was made a police magistrate. He was a pompous, stupid man, very attentive to forms, but frequently ignorant how to apply them. The very first day he sat in his public capacity, he made a blunder that stuck by him ever after. A man was brought up before him for picking pockets. Mr. Smith seemed to have reflected deeply, and prepared a speech, of which he was anxious to deliver himself. He heard the case, therefore, with all the solemnity of a trial for murder. He listened with the profoundest attention to all the evidence, and then taking a three-cornered hat in his hand, he thus addressed the prisoner, with the utmost gravity:—"Thomas Styles, you have been found guilty on the clearest evidence of the abominable crime of picking pockets. The testimony of the witnesses has been clear and satisfactory, and no doubt of your heinous guilt remains. It now only remains for me to pass the dreadful sentence of the law. The sentence of the Court on you is, that you be taken hence to the prison at Cold Bath Fields; that you be there confined for the space of one month, be once privately whipped before you quit it; and (putting on the hat, and looking at the prisoner with the most sorrowful solemnity) *God have mercy on your wretched soul!*"

In the perusal of a very solid book on the progress of the ecclesiastical differences of Ireland, written by a native of that country, after a good deal of tedious and vexatious matter, the reader's complacency is restored by an artless statement how an eminent person "abandoned the errors of the Church of Rome, and adopted those of the Church of England."

The following is a translation of the first bill ever filed in Chancery:—

"To the very Reverend Father in God the Archbishop of York, Chancellor of England, sheweth Thomas Duke of Gloucester; That, whereas by an inquest taken before the Escheater of our Lord the King in the county of Salop, by writ of *diem clausit ex-*

tremum, after the death of Thomas late Earl of Stafford, it was found by the same inquest that the said late Earl died seised in demesne as of fee, among other lands and tenements in the said county, of a messuage and certain other lands and tenements with the appurtenances, in the town of Bridgenorth, in the said county, the custody of which lands and tenements, among other lands and tenements, which were of the said late Earl, was committed to the said Duke, to have under a certain form, as in the letters patent of our said Lord the King, thereupon made to the said Duke, is more fully contained. And so it is that Thomas Othale, with divers other persons, have entered into the said lands and tenements in the said town, on the possession of our said Lord the King. Wherefore may it please your sage discretion to consider the matter aforesaid, and to grant a writ directed to the said Thomas Othale, for to be before you in the Chancery of our said Lord the King at the Octaves of the Trinity next coming, under the penalty of 100*l.*, to answer the matters aforesaid, done in contempt of our said Lord the King."[1]

"Qui hæret in literâ hæret in cortice, is a familiar maxim of the law," said Chief Justice PARKER. "'The letter killeth, but the spirit maketh alive,' is the more forcible expression of Scripture."[2]

In 1841, relative to the trial of Warren Hastings, Lord Macaulay wrote: "The result ceased to be matter of doubt, from the time when the Lords resolved that they would be guided by the rules of evidence which are received in the inferior courts of the realm. Those rules, it is well known, exclude much information which would be quite sufficient to determine the conduct of any reasonable man, in the most important transactions of private life. These rules, at every assizes, save scores of culprits whom judges, jury, and spectators firmly believe to be guilty. But when those rules were rigidly applied to offences committed many years before, at the distance of many thousands of miles, conviction was, of course, out of the question. We do not blame the accused and his counsel for availing themselves of every legal advantage in order to obtain an acquittal. But it is clear that an acquittal so obtained cannot be pleaded in bar of the judgment of history."

In 1824, John Richardson, Esq., published an edition of Branch's Maxims with a translation. The following are specimens of this scholarly performance: Errores scribentis, nocere non debent, that is, clerical errors ought not to vitiate, is translated, "*The mistakes of a man writing ought not to harm.*" Again, the well-known maxim,

[1] See A Calendar of Proceedings in Chancery, printed in 1827.
[2] Henshaw *v.* Foster, 9 Pick. 317.

Omnis nova constitutio futuris temporibus formam imponere debet, non praeteritis, which Mr. Broom accurately translates, "A legislative enactment ought to be prospective in its operation, not restrospective, is thus rendered, "*Every new institution should give a form to future times, not to past.*"

When *Pickard* v. *Sears*, 6 A. & E. 464, which is a leading case, was cited in the course of the argument in *Cave* v. *Mills*, 8 Jurist N. S. 364 (1862), WILDE B. remarked: "It does not augur well for a case to class it with *Pickard* v. *Sears*. I do not speak as impeaching that decision, but it has bad associations." In a previous case, *Bill* v. *Richards*, as reported in 3 Jurist N. S. 522, POLLOCK C. B. said: "In the copy of Adolphus and Ellis which belongs to this court, some one, probably one of the barons, has corrected the report of the judgment in *Pickard* v. *Sears*, by putting in the margin 'wilfully induces' instead of 'wilfully causes' another to believe, &c."

In Fuller's Worthies (published in 1662) we have an account, of which the following is an abridgment, of the price of the common law books extant in his time, compared with those of the civil and canon law:—

"One may bury 2000*l.* and upwards in the purchase [of the latter], and yet hardly compass a moiety of them; whereas all the writers of the common law, except they be much multiplied very lately, with all the Year-Books belonging thereunto, may be bought for three-score pounds, or thereabouts; which, with some, is an argument that the common law imbraceth the most compendious course to decide causes; and, by the fewness of the books, is not guilty of so much difficulty and tedious prolixity as the canon and civil laws. Yet it is most true the common law books are dearer than any of the same proportion. Should an old common law book be new printed, it would not quit cost to the printer. A whole age would not carry off a new impression, and the tediousness of the sale would eat up the profit."

On the intimate connection between the two civil codes, those of Rome and of England, Lord HOLT observed: "Inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things." 12 Mod. 482.

A story is told of a house seeming irretrievably on fire, until the flames coming in contact with the folio Corpus Juris and the Statutes at Large, were quite unable to get over this joint barrier, and sank defeated.

The following is a brief extract from a law paper, for the full understanding of which it has to be kept in view that the pleader, being an officer of the law, who has been prevented from executing his warrant by threats, requires, as matter of form, to swear that he was really afraid that the threats would be carried into execution:—

"Farther depones, that the said A. B. said that if deponent did not immediately take himself off he would pitch him (the deponent) down stairs—which the deponent verily believes he would have done.

"Farther depones, that, time and place aforesaid, the said A. B. said to deponent, 'If you come another step nearer I'll kick you to hell'—which the deponent verily believes he would have done."

According to Lord CAMPBELL, in the tenth year of King Henry VII., that very distinguished judge, Lord HUSSEY, who was Chief Justice of England during four reigns, in a considered judgment delivered the opinion of the whole Court of King's Bench, as to the construction to be put upon the words, "As free as tongue can speak or heart can think."[1]

In *King Henry VI.*, Part II., Act 4, Sc. 7, Cade, announcing his policy when he should mount the throne, says:—

"The proudest peer in the realm shall not wear a head on his shoulders unless he pay me tribute: there shall not a maid be married but she pay me her maidenhead ere they have it. Men shall hold of me in capite; and we charge and command that their wifes be as *free as heart can wish, or tongue can tell.*"

In *Nash* v. *Battersby*, 2 Ld. Raym. 986, and 6 Mod. 80, the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

The following epigram was thrown to Burke while he was making his celebrated speech against Warren Hastings:—

> Oft have we wondered that on Irish ground
> No poisonous reptile has e'er yet been found;
> Revealed the secret stands of nature's work,
> She saved her venom to create a Burke.

These lines have always been erroneously attributed to Mr. Law (Lord ELLENBOROUGH), but the real author was Hastings himself; his private secretary (Mr. Evans) sat by his side during the trial, and saw him write them.[2]

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[1] Year Book, H 10 H. 7, fol. 13, pl. 6.
[2] Notes and Queries.

In *Lincoln* v. *Wright*,[1] Lord LANGDALE, in the course of the argument, observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something."

There have been many eulogies on trial by jury; but this spoken of by Sir James Mackintosh in his defence of Jean Peltier, charged with a libel on Buonaparte, First Consul, is probably unsurpassed in beauty:—"He now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal."[2]

On the force which the *arguments* of an advocate ought to have, the opinion of Dr. Johnson is thus recorded by Boswell:—"Sir James Johnston happened to say, that he paid no regard to the arguments of counsel at the bar of the House of Commons, because they were paid for speaking. *Johnson.*—Nay, sir, argument is argument. You cannot help paying regard to these arguments if they are good. If it were testimony you might disregard it, if you knew that it was purchased. There is a beautiful image in Boyle upon this subject: Testimony is like an arrow shot from a long-bow; the force of it depends on the strength of the hand that draws it. Argument is like an arrow from a cross-bow, which has equal force, though shot by a child."[3] From Johnson's Dictionary, ad verb., Cross-bow, the exact words of Boyle appear to be these: "Testimony is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument is like the shot of the cross-bow, equally forcible whether discharged by a giant or a dwarf."

The way in which an Irish peasant answers questions is thus told by Sir Jonah Barrington:—"The Irish peasant never answers any question directly. In some districts, if you ask him where such a gentleman's house is, he will point and reply, 'Does your honor see that large house there, all amongst the trees, with a green field before it?' You answer, 'Yes.' 'Well,' says he, 'plaze your honor, *that's not it*. But do you see the big brick house with the cow-houses by the side of that same, and a pond of water?' 'Yes.' 'Well, plaze your honor, *that's not it*. But if you plaze, look quite to the right of that same house, and you'll see the top of a castle amongst the trees there, with a road going down to it betune the bushes.' 'Yes.' 'Well, plaze your honor, *that's not* it neither. But if your honor will come down this bit of a road a couple of miles, I'll show it you, *sure enough*."[4]

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[1] 4 Beav. 171 (1841).
[2] Sir J. Mackintosh's Miscellaneous Works, vol. iii., p. 245.
[3] Life of Johnson, by Boswell, vol. viii. p. 281, ed. 1835.
[4] Sir Jonah Barrington's Personal Sketches, vol. i. p. 154, ed. 1827.

A DIGEST

Of all *the Cases Decided in the English Courts of Equity, from Michaelmas Term*, 1861, *to the Sittings after Trinity Term*, 1862, *both inclusive, as Reported in* Vol. X. *of* The Weekly Reporter, 1861–62, *or in other Legal Reports during the same period, together also with certain Cases Reported during the same period, but Decided previously thereto.*

*** In the following Digest the letters L.C. after the name of a case indicate LORD CHANCELLOR'S COURT; L.J., LORDS JUSTICES' COURT; L.C. & L.J., the FULL COURT of the LORD CHANCELLOR and LORDS JUSTICES; M.R., the MASTER OF THE ROLLS' COURT; V.C.K., the VICE-CHANCELLOR KINDERSLEY'S COURT; V.C.S., the VICE-CHANCELLOR STUART'S COURT; V.C.W., the VICE-CHANCELLOR WOOD'S COURT. The figures which follow these letters denote the page in The *Weekly Reporter*. Then follow references to other authorities where the case is reported.

ACCUMULATIONS.

Thellusson Act—Raising portions.—Where there is a gift to trustees of money upon trust to invest, to receive the dividends during the life of A., and invest and accumulate such dividends in the way of compound interest for the benefit of B., the wife of A., and her younger children, that is not a gift to raise portions for younger children, within the exception of the 2d section of the Thellusson Act.

Where there is a gift of the residue of a testator's estate, in case it shall not exceed a sum named, to two persons, and in case it shall exceed that sum, after deducting such sum, there is a direction that an addition shall be made to the legacies before given out of the surplus, that is a gift of residue and not a legacy. *Watt* v. *Wood*, V.C.K. 335; 13 L. J. Ch. 338.

And see WILL, 14, 88.

ADMINISTRATION.

1. *Administration of assets — Compromise of claims—Powers of executors.*—A. had a claim for upwards of £1000 against a testator's estate, of which B., C., and D. were the executors. On the other hand, A. and B. (one of the executors) were jointly liable to pay £2000 to the same estate. A. brought an action against B., C., and D. (as such executors) to recover his claim. C. and D. defended the action, and offered to compromise the claim for £600, which was refused by A. B., who had not taken any part in the defence of the action, then, in his character of executor, entered into an arrangement with A., by which A.'s claim was to be allowed against the testator's estate to the extent of £1000, and set-off against the £2000 due from A. and B. jointly to the same estate.

Held that this arrangement entered into by B. without the assent of his co-executors, and which had the effect of relieving him from one-half of the liability which he was under to his testator's estate, did not bind such estate, and at the instance of the co-executors it was ordered to be set aside. *Stott* v. *Lord*, M.R. 284; 8 Jur. N. S. 249; 5 L. T. N. S. 817; 31 L. J. Ch. 391.

2. *Assets — Executors—Indemnity.*—Executors distributing assets under the direction of the court are absolutely protected and indemnified against future claims by the order of the court, so that there is no necessity for retaining assets to meet possible future claims. Creditors afterwards disputing the application of the assets must proceed against the legatees.

Semble, before 23 & 24 Vict. c. 38 (a.

12), s. 27 of 22 & 23 Vict. c. 35 was retrospective. *Bennett* v. *Lytton*; *Re Sandford's Trust*, V.C.W.; 2 J. & H. 155.

3. *Costs.*—Where trustees have not strictly administered the estate of a testator, and the estate proves insufficient, they may be refused their costs. *Beer* v. *Tapp*, L.J. 277; 6 L. T. N. S. 269.

4. *Deficient estate—Form of decree.*—Form of decree for distributing an estate charged with annuities and legacies, but insufficient for the purpose. *Heath* v. *Nugent*, M.R.; 29 Beav. 226.

5. *Legacy charged on real in aid of personal estate—Insufficiency of personal assets of first testator—Residuary legatee—Adoption of debt by second testator.*—A. (the first testator) by his will bequeathed a legacy of £4000 to trustees for the benefit of certain persons in succession; and directed that in case his personal estate should be insufficient to pay the same, it should be raised out of his real estates. B. (the second testator) was made residuary devisee and legatee. At the death of A. his real estate consisted of the X., Y., and Z. estates. After the estate had been duly administered, with the exception of the raising of the legacy of £4000, the surviving trustee and executor gave up to B. the possession of the whole of the real and personal estates of A. An account was opened by B. in his ledger of the legacy of £4000, and interest thereon was regularly paid to the persons entitled. B. subsequently executed a deed to which the surviving trustee and executor of A. was the only other party, whereby it was agreed that estate X. should be discharged from the liability to pay the legacy, and that estates Y. and Z. should alone remain charged with and liable to such payment. B. then died, having by his will devised X. and Y. to two different devisees, left Z. undisposed of, and also bequeathed his personal estate to various persons.

Held, that, as between the different claimants under the second testator, the last-mentioned deed and the entry in the ledger did not amount to an adoption by the second testator of the liability to pay the legacy as a personal debt, or to create a charge by him on any property possessed by him which did not already exist; also that as to the persons entitled to the legacy under the will of the first testator they were wholly unaffected by such transactions, but that a species of liability attached to the property of the second testator to make good the legacy, the extent and nature of which liability depended upon the original sufficiency or insufficiency of the personal estate of the first testator to pay the legacy in full.

If the personal estate of the first testator was originally sufficient to pay the legacy in full, the second testator, by taking possession of the personal estate of the former to an amount more than sufficient to pay the legacy, rendered his assets liable, in a due course of administration, to make good to the legatee the amount of the legacy so allowed to remain unraised out of the personal estate of the first testator.

If the personal estate of the first testator was originally insufficient to pay the legacy in full, then so much of the real and personal estates of the first testator handed over to the second testator as, at the death of the latter, remained in specie, were liable to the payment of the legacy in the same order as that in which they would have been applicable at the death of the first testator; the personal estate of the second testator being liable to make good any deficiency arising from the disposition by him of the rest of such real and personal estate to the extent of such disposition. *Hepworth* v. *Hill*, M.R. 477; 6 L. T. N. S. 403.

6. *Legacy—Legatee indebted—Set-off Trustee and* cestui que trust.—A legatee is not entitled to receive out of the testator's estate any part of his legacy until a debt due from him to the estate has been satisfied, and this principle was extended to a case where the debt was a partnership debt from a firm of which the legatee was a member.

A debt due to trustees as creditors upon the estate of the testator under a covenant contained in his marriage settlement is not satisfied by a legacy to the *cestui que trust*. *Smith* v. *Smith*, V.C.S.; 3 Giff. 263; 7 Jur. N. S. 1140; 5 L. T. N. S. 302; 31 L. J. Ch. 91.

7. *Statute of Limitations—Claim by executor.*—Where a judgment has been recovered against executors in an action for a simple contract debt, which had

been barred by lapse of time in the testator's lifetime, the Statute of Limitations cannot be set up in an administration suit against the claim of the executors in respect of such debt. *Re Freer's Estate, Hunter* v. *Baxter*, V.C.S.; 5 L. T. N. S. 46; 3 Giff. 214.

8. *Suit by annuitant to have the annuity secured — No arrears due — Costs.* —In a suit to secure an annuity which was charged upon the whole of the testator's estates, but in such a manner that it was not incumbent on the trustees to sell any part thereof to raise and pay the annuity, it appeared that, before suit, the representatives of the testator had made the plaintiff a beneficial offer to secure the annuity, which had been refused, also that the annuity had never been in arrear.

Held, that the plaintiff was entitled to a declaration that the annuity proved a charge on the estate, and that when any portion of such estate was sold, a sufficient portion was to be apportioned to secure the annuity, but that the plaintiff must pay the costs of the suit up to and including the hearing. Liberty to apply in case the annuity should fall in arrear. *Burrell* v. *Delevante*, M.R. 362; 8 Jur. N. S. 204; 31 L. J. Ch. 365.

And see EXECUTOR; MORTGAGE, 2, 3; PARTNER, 2; PRACTICE, 2—9, 40; TRUSTEE, 12.

AGREEMENT.

1. *Advance of part only of sum agreed to be advanced — Lien.*—M. having contracted to construct a railway, and being in want of money, applied to H. to advance him £60,000, which he agreed to do, and by a memorandum, in consideration of H. advancing that sum, M. agreed to cede to him one-third of the profits to be derived from the contract, and proposed that the contract should be a security for the same, and agreed that he should sign an agreement on the terms therein referred to. In the transactions which followed, H. failed to fulfil his engagement, but advanced certain sums, far less than the stipulated amount, for the payment of a part only of the bills which he had accepted for H., others of which he had never paid. The plaintiff, who had taken an assignment from H. of his interest under the memorandum, filed a bill praying an account of the money so received by M. from H., and that it might be a charge on the profits of M.'s contract.

Held (reversing a decision of V. C. Stuart), that as the agreement had not been fulfilled, neither H., nor the plaintiff, as his assignee, was entitled to any benefit from it in a court of equity. *Twynam* v. *Hudson*, L.C. 653; V.C.S. 312; 5 L. T. N. S. 820; 8 Jur. N. S. 476.

2. *Construction — Permission to use roads — Injunction.*—An agreement between two adjoining landowners contained a clause to the effect that A. for himself, his heirs and assigns, thereby agreed "to give and grant unto B., his heirs and assigns, and his and their lessees and occupiers, full and free permission to use at all times the roads and ways in and through A.'s estate, and to make the several openings and ways in and upon the same already agreed upon."

Held, upon the construction of this clause, that B. was entitled to the full use of the roads, &c., *through* A.'s estate, and to restrain A. from making and continuing an obstruction at the boundary of his land, so as to prevent B. from passing beyond A.'s estate. *Phillips* v. *Treeby*, V.C.S.; 6 L. T. N. S. 213; 8 Jur. N. S. 711.

ANNUITY.

1. By marriage settlement a term was created out of freehold property, for the purpose of securing a yearly rent-charge of £300 for the wife, during her life, after the death of the husband and his father, with a power for the husband to create a limitation for charging the property with £5000. The husband by his will charged the estates with £5000, and limited them to trustees for a time of 500 years, with a declaration that the trustees should stand possessed of the £5000 and the term upon trust by sale, &c., to raise and pay his debts, and pay his wife £2000.

Held, that the fee simple could be sold to raise the arrears of the rent-charge, but that a sale could not have been directed for the purpose of raising the rent-charge of £5000. *Hall* v. *Hurst*, V.C.W.; 2 J. & H. 76.

2. Direction to executor to purchase an annuity of £50 per annum in Gov-

ernment securities for A. B. in consideration of her faithful services.

Held, a perpetual annuity. *Kerr* v. *Middlesex Hospital*, 2 D. G. M. & G. followed. *Ross* v. *Borer*, V.C.W. 644; 6 L. T. N. S. 514.

And see ADMINISTRATION, 8; BANKRUPTCY, 34; EXECUTOR, 9; LEGACY DUTY; WILL, 18–21.

APPRENTICE.

Jurisdiction. — Bill praying that the defendant, a ship-builder, might be compelled to execute indentures of apprenticeship, pursuant to an agreement under which the plaintiff had worked in the defendant's yard, for a month, on trial, with a view to being bound apprentice to him, dismissed, but without costs. *Brown* v. *Banks*, V.C.S.; 3 Giff. 190; 4 L. T. N. S. 698; 7 Jur. N. S. 1273.

ARBITRATION.

Award.—The arbitrator being a judge selected by the parties to decide the matters in contest between them without appeal, mere error of judgment on his part is no ground for setting aside the award. But the Court, when called upon to review proceedings before an arbitrator, must see that the ordinary rules for the administration of justice have been observed.

Before excluding any person from attending on behalf of any of the persons interested the arbitrator is bound to ascertain that there is good reason for the exclusion, and to take care that the party affected by the exclusion is not thereby prejudiced. An exclusion without adequate ground will induce the Court to set aside an award.

Observations upon a delegation of authority to an accountant by the arbitrator. *Re Haigh's Estate, Haigh* v. *Haigh*, L.J.; 6 L. T. N. S. 507; 31 L. J. Ch. 420.

ASSIGNOR AND ASSIGNEE—ASSIGNMENT.

Chose in action—*Set off.*—Assignees of a *chose in action* take it subject to any right of set-off which may be enforced against the assignor.

A. assigned to B. a debt due from the company, of which he was director, for fees. Calls were made, and the company was subsequently wound up, and a compromise was made by the official manager by which A. was released from all liability on his relinquishing all claims against the company.

Held, that B., who, although he had give notice of the assignment, had not sued for the debt before the calls were made, was bound by the compromise under which the official manager had set off the debt against A.'s liability for calls. *Re The National Alliance Assurance Company, Ashworth's case*, V.C.W. 771.

And see BANKRUPTCY, 19; FOREIGN ATTACHMENT; INSOLVENCY, 1, 2; MASTER AND SERVANT; JOINT STOCK COMPANY, 3, 4; PRACTICE, 36.

AUTHOR AND PUBLISHER.

Account—Money Demand.—Although this Court has jurisdiction to entertain a bill for an account by a principal against an agent, it will not do so when the claim is a mere money demand which may be perfectly well ascertained at law.

Semble, this Court will entertain a suit instituted by an author against his publisher for an account, where the latter refuses to render an account altogether; but if such publisher renders an account showing a certain balance due from the author for which he brings an action, this Court will not, in the absence of fraud or mis-statement, allow a suit to be instituted by the author praying an account and an injunction, but will leave the question to be determined at law. *Barry* v. *Stevens*, M.R. 822; 6 L. T. N. S. 568.

And see COPYRIGHT.

BANK.

Joint Stock bank—Shares standing in joint names — Survivorship — Resulting trust.—A. buys a number of shares in a joint stock bank, and causes them to be transferred into the names of herself and B., a lady living with A., and dependent on her. A. dies leaving B. surviving.

Held, that the legal right to the shares passed to the survivor.

Held also (*dubitante* Knight Bruce, L. J.) that there was no resulting trust and that B. was entitled to the shares. *Garrick* v. *Tayler*, L.J. 49; 17 Jur. N. S. 1174; 31 L. J. Ch. 68.

And see WINDING UP, 1.

BANKRUPT—BANKRUPTCY.

1. Circumstances under which the Court, without expressing any opinion

as to the right of a bankrupt to an order of discharge, allowed him an opportunity of amending and explaining his schedule with a view to applying for his discharge after having made a full discovery of his estate under sect. 110 of 24 & 25 Vict. c. 134. *Re Delamere*, L.J.; 6 L. T. N. S. 274.

2. *Adjudication—Act of Bankruptcy.*—A petition for adjudication ought not to be rested on disputed balances of cross demands, complicated dealings or unsettled accounts.

Circumstances under which a payment for the purpose of annulling an adjudication made without the authority, sanction, or knowledge of the alleged bankrupt, and not with his money, was held not to constitute an act of bankruptcy within sect. 71 of the Bankrupt Law Consolidation Act, 1849. *Ex parte Scott Russell, Re Scott Russell*, L.J.; 6 L. T. N. S. 13.

3. *Adjudication—Appeal—Fresh evidence—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134).—An adjudication ought not to be rested upon doubtful or disputed debts, or upon debts involving accounts still unsettled.

Upon an appeal from the decision of a commissioner in bankruptcy, new evidence will not be admitted except under very special circumstances. *Re Potts*, L.J.; 6 L. T. N. S. 137.

4. *Adjudication—Execution.*—An execution was issued by A. against his brother B., under which the whole of the property was seized, and nothing remained for the general creditors.

Held, in the absence of evidence as to any desire by B. to defeat or to delay his creditors that there had been no act of bankruptcy, and an adjudication was accordingly refused. *Ex parte Boyd, Re Murless*, L.J.; 6 L. T. N. S. 142.

5. *Appeal to House of Lords—Discretion of Court of Appeal*—24 & 25 *Vict. c.* 134.—The repeal of sect. 18 of the Bankrupt Law Consolidation Act, 1849, by the 24 & 25 Vict. c. 134, does not annul the discretionary power of the Lords Justices in allowing appeals to the House of Lords which they before possessed under that statute and the 14 & 15 Vict. c. 83, s. 10. *Re Newton*, L.C. 547; 8 Jur. N. S. 495; 6 L. T. N. S. 314.

6. *Assignee.*—Form of order vacating the appointment of assignees by the commissioner (which had been held void for irregularity), and directing a meeting for the choice of new assignees. *Re Wolverhampton and Staffordshire Railway Company; Re Boddington*, L.J.; 6 L. T. N. S. 207.

7. *Action by assignees—Costs.*—Creditors objecting to an action brought by the assignees on the ground that it was not an action within sect. 153 of the Bankrupt Act, 1849, so as to entitle the assignees to receive the costs out of the estate, must not wait until the result of the action has been ascertained before raising their objection. *Ex parte Edmondson; Re Thompson*, L.J.; 6 L. T. 234.

8. *Choice of assignees.*—Cestui que trust.—A *cestui que trust* is entitled to vote in the choice of creditors' assignees for the estate of the bankrupt trustee. *Ex parte Cadwallader, Re Eli James*, L.J.; 6 L. T. N. S. 485.

9. *Bill of sale—Injunction.*—Where a bankrupt on his own petition, and his assignee, advertise goods for sale, which are the subject of a bill of sale, the party to whom such bill is given, having satisfied a distress for rent and expenses, the Court will interfere by injunction to restrain the assignee from selling or disposing of the goods, on the terms of his bringing an action to try the legal right forthwith, but will grant no injunction as against the bankrupt. *Mayers* v. *Flaxman*, V.C.K. 399; *Mather* v. *Lay*, V.C.W. 400 (note.)

CERTIFICATE.

10. *Fraud.*—Where the commissioner had refused a certificate on the ground of fraud, the Court will not interfere, unless there are circumstances showing that such fraud was not for the bankrupt's personal benefit. *Re Freston*, L.J. 25; 5 L. T. N. S. 267; 7 Jur. N. S. 1173.

11. *Fraud—Accommodation Bills.*—Where a bankrupt has systematically passed off accommodation bills as ordinary trade bills, it will be considered misconduct sufficient to justify a refusal of his certificate. *Re Laurence, Mortimore & Schrader, Ex Parte Laurence*, L.J. 22; 5 L. T. N. S. 105; 7 Jur. N. S. 1218.

12. *Fraud — "Salting" Invoices — Costs.* — Where a tradesman has deliberately misrepresented the value of goods contained in an invoice, for the purpose of obtaining advances, it will be considered fraud sufficient to justify a total refusal of his certificate.

In such a case the bankrupt will be ordered to pay the whole of the costs of appeal. *Re Johnson and Gillman, Ex parte Johnson* L.J.; 5 L. T. N. S. 228.

13. *Gaming—Time bargain.*—Whether time bargains in mining shares are gaming within the 201st section of the Bankrupt Consolidation Act, 1849—*quære. Ex parte Mellor, Re Mellor and Eason*, L.J.; 8 De G. M. & J. 248. (See *Ex parte Ryder*, 1 De G. & J. 317.)

14. *Total Refusal—Protection.*—Circumstances under which the Court wholly refused a bankrupt's certificate on the ground of fraudulent preference.

In a case of total refusal of the certificate, *quære* as to the value of protection. *Ex parte Barton, Re Barton*, L.J.; 6 L. T. N. S. 142.

15. *Total refusal — Fraudulent preference — Reckless trading.* — Circumstances under which the decision of a commissioner wholly refusing a certificate to a bankrupt on the ground of fraudulent preference, improper bookkeeping, and reckless trading was reversed, the Court of Appeal holding that there had been no fraudulent preference, and that the bankrupt was entitled to a second-class certificate. *Ex parte Shotter, Re Shotter*, L.J.; 6 L. T. N. S. 136.

15a. *Copyholds—Specific performance —Assignees necessary parties.* — Under sect. 114 of 24 & 25 Vict. c. 134, the assignees of a bankrupt have such an interest in his copyholds as to make them necessary parties to a bill for specific performance of an agreement to execute a mortgage of such copyholds. *Poole* v. *Bursell*, V.C.S. 861.

16. *Creditors' Deed—Execution within limited time*—12 & 13 *Vict. c.* 106, *s.* 68.—A debtor executed a deed by which he conveyed his whole estate and effects to trustees, upon trust for such creditors as should assent thereto within three calendar months.

Held, that the deed was within the protection of the 68th section of 12 & 13 Vict. c. 106. *Harris* v. *Pelli*, V.C.S. 599; 6 L. T. N. S. 572.

17. *Composition deed — Just allowances—Jurisdiction.*—The trustees of a composition deed had carried on the business, and got in considerable sums due to the estate, and were about to proceed to a sale, when an adjudication of bankruptcy was obtained on behalf of the trader, the effect of which was to stop the preparations by the trustees for a sale.

Held, that the Court had jurisdiction to direct payment out of the estate, to the trustees, of the expenses incurred by them, with a view to benefiting the estate, although no benefit under the circumstances had actually accrued. *Ex parte Tomlinson, Re Boyce*, L.J.; 7 Jur. N. S. 982; 5 L. T. N. S. 13.

18. *Order of discharge.* — The Court has power, under 24 & 25 Vict. c. 134, s. 160, to grant an order of discharge to a bankrupt who has been refused his certificate under the Act of 1849, notwithstanding sect. 230 of the first-mentioned Act.

The Court will not lay down any rule as to the application of sect. 160, but every case must be determined upon its own circumstances. *Re Matheson*, L.J. 256; 8 Jur. N. S. 371; 6 L. T. N. S. 203.

19. *Assignment.*—A partner who has executed a general deed of assignment for the benefit of his creditors within the Bankruptcy Act, 1861, is entitled to protection against the creditors of the firm as well as against separate creditors. *Ex parte Castleton, Re Castleton*, L.J. 851; 6 L. T. N. S. 705.

20. *Order of discharge—Section* 110 *—Discretion of the Court.* — Whether the Court has jurisdiction to refuse an order of discharge when applied for under the 110th section of the Act of 1861 —*quære.*

Where the Court of appeal has given liberty to apply, application may be made by way of appeal from a subsequent order of the commissioner, although the time for appealing has expired. *Re Delamere*, L.J. 547; 6 L. T. N. S. 486.

21. *Discretion of the Court—Bankruptcy Act*, 1861, *s.* 159.—Whether the Court has a discretion to refuse the order of discharge for any cause not falling within the 159th section of the Bank-

ruptcy Act, 1861—*quære*. *Re Boswall, Ex parte Glass & Elliott*, L.J. 533; 6 L. T. N. S. 407.

22. *Discretion of Court—Bankruptcy Act*, 1861, *s.* 159. The discretionary power formerly vested in the Commissioners of Bankruptcy of refusing or suspending a bankrupt's order of discharge on a general view of his conduct before bankruptcy, is taken away by the Bankruptcy Act, 1861, s. 159, and under its provisions the power to refuse or to suspend the discharge, or to accompany it with conditions, or to pronounce a penal sentence, only arises if one or other of the cases specified in the 3d rule of that section, which are conditions precedent to the exercise of that power, has been previously ascertained to exist. *In re Mew & Thorne*, L.C. 790.

23. *Excessive expenditure — Negligence.*—Circumstances under which the Court, differing in opinion from the Commissioners, suspended the order of discharge for three instead of twelve months and granted immediate protection, being of opinion that the bankrupt, though negligent in keeping his books, had not been dishonestly so, or guilty of fraud, and that a charge of excessive and improper expenditure had failed. *Ex parte Holden, Re Holden*, L.J.; 6 L. T. N. S. 673.

24. *Rash and hazardous speculation.*—A trader, possessed of a considerable surplus, consigns to America a very large amount of goods, which are disposed of at such a loss as to render the consignor bankrupt.

Held, that in the absence of fraud, misrepresentation, or dishonesty, mere imprudence did not render the speculation "rash or hazardous" within sect 159 of the Bankruptcy Act, 1861, so as to justify the Court in directing a protection or withholding the discharge. *Ex parte Evans, Re Barnard & Rosenthal*, L.J.; 6 L. T. N. S. 519.

25. *Surprise.*—A bankrupt received his order of discharge in the absence of the opposing creditor, who ascertained by his solicitor that the case was not in the paper for hearing by the commissioner, and would not come on on that day.

Held, that this was a case of surprise within sect. 171 of 24 & 25 Vict. c. 134, the creditor having been misled by no fault of his own or of his solicitor, and that the order of discharge must be reversed. *Ex parte Johnstone, Re Newton*, L.J.; 6 L. T. N. S. 234.

26. *Double proof—Foreign court.*—Where part of the assets of a bankrupt are situated in a foreign country, and are being administered under the bankrupt laws of that country, a creditor who has received a dividend in England, and has subsequently received a dividend in the foreign bankruptcy in respect of the same debt, will not be compelled to refund the English dividend, although he will not be entitled to participate in any further dividends under the English bankruptcy. *Re Deane, Youle, & Co., Ex parte Smith*, L.J. 276: 6 L. T. N. S. 268.

27. *Inspectorship deed—Contribution.*—Where a call has been made upon the creditors, who had executed a deed of inspectorship for the purpose of indemnifying the trustees, a creditor who had not only proved a debt under the deed, but had also received payment of a separate debt on consideration of suspending proceedings in bankruptcy, was held only liable to contribute in respect of the debt proved under the deed *Cheeseborough* v. *Wright, Ex parte Waud*, L.J. 47; 5 L. T. N. S. 74; 31 L. J. Ch. 226.

28. *Jurisdiction — Bankruptcy Act*, 1861, *sect.* 197.—The Court of Bankruptcy referred to in the Bankruptcy Act, 1861, sect. 197, is the court which would have jurisdiction over the matter if proceedings were taken in bankruptcy. *Re Eaton & Cox*, L.J. 744; 6 L. T. N. S. 672.

29. *Order and disposition—Joint stock company—Transfer of shares in blank—Reputed ownership—7 & 8 Vict. c.* 110, *s.* 26—*Costs.*—On the 19th of July, D., who had recently purchased shares in a joint stock company, sold them through his broker to the plaintiff, and executed the deeds of transfer in which the name of the assignee and the date were left in blank. The deeds were then taken to the office of the company, when memoranda to the effect that the transfers had been certified were indorsed thereon, and they were then delivered to the plaintiff. On the 30th of July, D. was adjudged a bankrupt Shortly afterwards the plaintiff filled up the blanks in the transfers, and inserted a date subsequent to the bank-

ruptcy, but the pcomany refused to register them without the concurrence of the assignees. The plaintiff filed a bill against the assignees to compel them to concur in executing to the plaintiff a transfer of the shares. The assignees alleged that they were in the possession, order, and disposition of D. at the time of his bankruptcy.

Held, that D. was not the apparent or reputed owner of the said shares, and that they were not within his order and disposition.

Held also, that D., though he had not executed the deed settlement of the company, was not restricted from selling his shares by the 26th section of the 7 & 8 Vict. c. 110.

Held also, that though the question might have been determined in the Court of Bankruptcy, the plaintiff had his election to sue in the Court of Chancery, and being entitled to the relief prayed for, must have his costs as against the assignees. *Morris* v. *Cannan*, L C. 589; 6 L. T. N. S. 521; 8 Jur. N. S. 653; V.C.S. 379; 6 L. T. N. S. 17.

30. *Partnership — Joint or separate estate.* — An assignment by one of two partners to the other of his share of the partnership estate and effects converts the joint estate of the partnership into the separate estate of the partner to whom the assignment has been made. *Re Walker*, L.J. 656; 6 L. T. N. S. 631.

31. *Practice—Appeal motion.* — It is the desire of the Lords Justices that appeal motions under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), should be placed in the paper for hearing as appeals by petition formerly were. *Ex parte Lewis, Re Hollier*, L.J.; 6 L. T. N. S. 143.

32. *Practice* — 12 & 13 *Vict.* c. 106, s. 235 (*Bankruptcy Act*, 1849). Defendants allowed, on payment of costs of an application to that effect, to give notice of their intention to dispute an alleged bankruptcy pursuant to section 235 of the Bankruptcy Law Consolidation Act, 1849, the words of which are now by the present state of pleading, which has abolished "rejoinders," no longer applicable. *Lee* v. *Donnistown*, M.R.; 29 Beav. 465.

33. *Partnership — Proof of debt.* Where the share of a deceased partner was allowed to remain in the firm on terms indicating that the transaction was in the nature of a loan, on the subsequent bankruptcy of the firm the executors were allowed to prove for the amount due to them. *Re Coster*, L.J. 372; 6 L. T. N. S. 199; 8 Jur. N. S. 629.

34. *Proof — Annuity — Interest.* — Where a sum of money is agreed to be paid by way of annuity, if the circumstances show that the transaction is in effect a loan at interest, it will be treated as such, notwithstanding it may be called an annuity, and proof will not be allowed of more than the principal and interest due at the time of the adjudication. *Re Nicholson, Ex parte Robinson*; L.J. 360; 6 L. T. N. S. 143.

And see JUDGMENT, 1; MORTGAGE, 15; PARTNERSHIP, 14; TRUSTEE, 20; WILL, 42; WINDING UP, 18.

BILL OF EXCHANGE.

1. *Destruction by drawer — Jurisdiction.*—Where A. drew a bill in his own favor on B., who accepted it, and A. then handed the bill to C., for value, but without indorsing it, and C. returned it to A. for indorsement, who, instead of indorsing it, destroyed it, and afterwards became bankrupt.

Held, that a bill would not lie by C. against B., the acceptor, for payment of the amount of the bill, there being no privity between them. *Edge* v. *Bumford*, M.R. 812.

2. *Law of Louisiana—Damages for non-payment.* — A firm in England undertakes to accept and pay bills of exchange, drawn upon them by B., their agent in Louisiana; the firm stopped payment, and the bills were protested.

Held, that B., who had paid the amount of the bills and an additional 10 per cent. which he was bound, by the law of Louisiana, to pay, in consequence of such bills having been protested for non-payment, was entitled to be admitted as a creditor under a deed of arrangement executed by the creditors of the firm, for the 10 per cent. as well as for the amount of the bills. *Walker* v. *Hamilton*, L.C. & L.J.; 1 De G. F. & J. 602.

And see MERCANTILE LAW.

BILL OF SALE.

Circumstances under which a bill of sale was set aside, on the ground that it

had been unduly and improperly obtained, but without costs, as the bill, by an execution creditor, contained unsupported charges of fraud. *Sykes v. Bond*, V.C.S.; 4 L. T. N. S. 859; 7 Jur. N. S. 1024.

And see BANKRUPTCY, 9.

BOARD OF HEALTH.

Contract—Power to bind the rates.—A local board of health has no power to enter into any contract so as to bind the rates, unless the engagement is executed in strict compliance with the regulations prescribed by the Public Health Act, 1848; and a court of equity is bound equally with courts of law to see that the enactment has been strictly pursued. *Frend* v. *Dennett*, V.C.W.; 5 L. T. N. S. 73.

BURIAL ACTS.

15 & 16 *Vict. c.* 85, *ss.* 32, 52—16 & 17 *Vict. c.* 134—*Parish Incumbent—Burial fees—Interment as of right—Interment by purchase.*—A clergyman can only claim the right to perform the burial service over, and receive the burial fees as to, persons buried in a cemetery provided under the Acts relating to the burial of the dead (15 & 16 Vict. c 85; 16 & 17 Vict. c. 134) in respect of such burial grounds attached to the parish or ecclesiastical district of which he is incumbent, as the inhabitants of that parish or district would have had a right to be interred in if the new cemetery had not been provided; and he is not entitled to claim in respect of burial grounds in which the right of interment can only be obtained by purchase, although the burials in these may be diminished by the establishment of the new cemetery.

The effect of the Burial Acts is to make the district of Toxteth Park a parish of itself, distinct from the parish of Walton-on-the-Hill.

The vicar of Walton-on-the-Hill and the incumbents of St. James, St. Michael, and St. John the Baptist, within the district of Toxteth Park, do not collectively, nor does any one of them individually, fill the character of "incumbent" of Toxteth Park within the meaning of the Burial Acts, and none of them have any claim to the fees paid for burials in the Toxteth Park cemetery.

None of these churches have burial grounds attached to them in which it can be said that the remains of persons dying within Toxteth Park would have been buried, as of right, if it had not been for the existence of the Toxteth Park cemetery. *Hornby* v. *The Burial Board of Toxteth Park*, M.R. 550; 6 L. T. N. S. 146; 8 Jur. N. S. 531.

CHARITY.

1. *Baptist chapel—Trust deed—Construction.*—Construction of a deed conveying land with a house then being built upon it, to the trustees of a Baptist chapel, for the purpose of providing a residence for the minister, and a lease by the trustees to another person set aside as improperly granted, having regard to the trusts and primary purpose of the deed. *Ward* v. *Hipwell*, V.C.S.; 6 L. T. N. S. 238; 8 Jur. N. S. 666.

CHARITY COMMISSIONERS.

2. *Consent—Proceeds of charity lands.*—The proceeds of the sale of charity lands taken by a railway company cannot be paid out of court to the trustees of the charity without the consent of the Charitable Commissioners. *Re Faversham Charities*, V.C.W. 291; 5 L. T. N. S. 787.

3. *Jurisdiction — Guardians.* — The guardians of the poor of C. are constituted a corporation under an Act of Parliament to manage a hospital and school to maintain and educate sixteen poor boys to be nominated by the mayor and commonalty and for other purposes, the Act being for the maintenance and employment of the poor, and for erecting a workhouse, &c. The mayor and commonalty are likewise the obligees in a bond given under the Act for £1000 by the guardians, whereby they are bound to admit such objects as are selected by the mayor and commonalty, who are themselves some of the guardians of the poor also. The mayor and commonalty having both before and after the Act selected at their discretion such objects as they esteemed deserving—the mode of selection is called in question by the guardians, who refuse to admit a boy appointed by the mayor and commonalty, on the ground that the word "poor" refers only to such persons or the children of such persons as are chargeable to the parish, and receiving parish relief. The mayor and commonalty bring an

action on the bond, and the guardians file a bill, under the advice of the Charity Commissioners, to restrain the action and obtain an injunction on judgment being given in the usual way.

Held, that having reference to the usage previously, and the Act of Parliament, the word "poor" referred to poor generally, and not to those only receiving parish relief, or chargeable to their parishes. That although this question might be decided in the action incidentally, yet inasmuch as that would not admit the boy, but merely recover money from one class of rate-payers to be paid to another, many of whom were the same, this court was the most satisfactory tribunal for trying the question. That this decision did not clash with that of the Charity Commissioners, but if it did, this court was bound to decide the question. *The Guardians of the Poor of the City of Canterbury* v. *The Mayor, &c., of Canterbury*, V.C.K. 609; 6 L. T. N. S. 637.

4. *Church endowment.*—A. gave £1000 to trustees for the endowment of a new district church, and the church was accordingly consecrated. After the consecration, A. and the trustees executed a deed declaring that the income was to be paid to the incumbent, for conducting the services, according to the rites of the Church of England, in strict literal accordance with the book of common prayer; and that in case of any dispute as to the services, it should be referred to the bishop.

Held, that daily service was not required, and that if the incumbent did not do his duty, proceedings should be instituted before the bishop.

Whether, after the consecration, it was in the power of A. to improve any particular trusts—*quære*—*Re Hartshill Endowment*, M.R.; 30 Beav. 130.

5. *Model lease.*—A model lease having been prepared and settled for charity lands, the lessors were allowed to execute leases of other portions of the land in accordance with the lease already settled without the necessity of a fresh approval in chambers on every occasion of each lease, the model lease being appended in a schedule to the order. *The Attorney-General* v. *Christ Church, Oxford*, V.C.S.; 3 Giff. 514.

6. 43 *Eliz.* c. 4—*Gift to keep tombs in repair*—*Perpetuity.*—A gift to the churchwardens of a parish of a sum of money to be invested in government or real securities, and the interest applied in keeping up the tomb of the testatrix herself, and also those of a number of her relations, was held void as tending to a perpetuity.

Such a gift is not charitable within the meaning of the statute of Elizabeth. *Rickard* v. *Robson*, M.R. 657; 8 Jur. N. S. 665.

7. *Scheme.*—The court will assume prima facie that the Attorney-General will, in preparing a scheme for a charity, do justice between all parties; and where no injustice appears to have been done, the court will not re-open the proceedings on the application of a person claiming to be interested, but not summoned to attend the Attorney-General, in chambers. *Re Sekeford's Charity*, V.C.W.; 5 L. T. N. S. 488.

8. *Superstitious use—Roman Catholic Charities Act*—23 & 24 *Vict.* c. 134—*Gift to officiating priests—Condition that they should celebrate masses for the repose of the soul of the founder.*—A trust was declared of a fund, and the dividends were directed to be paid to the officiating priests of certain Roman Catholic chapels, upon condition that they should, in their several chapels, celebrate and offer up masses for the repose of the soul of the founder.

Held, that the trust was void altogether, as a dedication to superstitious uses, and, the court refusing to direct a scheme, the trust fund, which had been paid into court, was ordered to be transferred to the person entitled to the residue of the founder's estate. *West* v. *Shuttleworth*, 2 My. & K. 684, followed. *Re Blundell's Trusts*, M.R. 34; 5 L. T. N. S. 337; 8 Jur. N. S. 5; 31 L. J. Ch. 52.

9. *Appointment of new trustees—Power in vestry—Metropolis Local Management Acts* (18 & 19 *Vict.* c. 120; 19 & 20 *Vict.* c. 112)—*Act of Parliament—Construction.*—Where the power of appointing new trustees of a charity within one of the metropolitan parishes was, by the decree of the court, and a scheme framed thereunder, vested in "the parishioners and inhabitants of such parish in vestry assembled"—

Held, that, after the passing of the

Metropolis Local Management Acts, which altered the constitution of parish vestries in the metropolis, the power of appointing new trustees of the charity was vested in the newly constituted vestry. *Re Hayle's Estate*, M.R. 577.

And see MARSHALLING; PRACTICE, 27, 60; WILL, 93.

CLIVE FUND.

East India Company—Transfer to the Crown—21 & 22 *Vict.* c. 105.—By a trust deed, dated in 1770, the East India Company became the trustees of five lacs of rupees (the gift of Lord Clive) and three lacs of rupees (the gift of the then Nabob of Bengal), upon trust to apply the interest thereof for the benefit of the persons employed by them in their military service, in the manner pointed out by the deed; and it was provided that, in case it should happen that the company should cease to employ a military force in their actual pay and service in the East Indies, then they should pay the sum of five lacs of rupees to Lord Clive or his representatives. In 1858 an Act was passed transferring the rights and liabilities of the East India Company to the Crown.

Held, that the event referred to in the proviso in the trust deed had not happened by reason of the passing of the last-mentioned Act, but that the effect of that Act was to pass to the Crown this trust fund, in common with all other trust funds held by the East India Company, for the Government of India to be applied to the same purposes. *Walsh* v. *Secretary of State for India*, M.R. 141; 8 Jur. N. S. 26; 5 L. T. N. S. 536.

COMMISSIONERS OF PUBLIC WORKS.

Lands Clauses Consolidation Act, 1845, *ss.* 1, 80—*Payment out of court of moneys paid in by Commissioners of Public Works under* 9 & 10 *Vict.* c. 34—3 & 4 *Vict. c.* 87—*Costs.*—On a petition for the payment out of court of moneys paid into Court by the Commissioners of Public Works on a purchase made under the provisions of the 9 & 10 Vict. c. 34, which incorporates the provisions of the 3 & 4 Vict. c. 87, the commissioners, as promoters of the undertaking, were held, on appeal not to be liable, under the 80th section of the Lands Clauses Consolidation Act, 1845, to pay the costs of such application. *In re Cherry's Settled Estates*, L.C. 305; 6 L. T. N. S. 31; 8 Jur. N. S. 446; 31 L. J. Ch. 851.—Reversing V.C.K. 54; 7 Jur. N. S. 1184; 5 L. T. N. S. 541; 31 L. J. Ch. 38.

CONTINGENT REMAINDER.

Freeholds—Copyholds—Leaseholds for lives—Destruction by tenant for life—Merger—Special occupancy.—Freeholds, copyholds, and leaseholds for lives, were devised to A. for life, with divers contingent remainders over (there being no estate vested in trustees, after A.'s life estate, to preserve contingent remainders), with an ultimate remainder to the right heirs of the testator.

A., the tenant for life, was also the heir-at-law of the testator at the time of his death, and he subsequently executed a statutory release, by which the devised estates were expressed to be resettled free and discharged from the limitations created therein by the testator's will.

Held, that as to the freeholds of inheritance devised, the deed operated to destroy the contingent remainders, inasmuch as there was no estate vested in trustees after A.'s life estate to preserve them.

Held also, that as to the copyholds, the same did not operate to destroy such contingent remainders, since the estate in the lord of the manor enured for their support.

Held also, that the deed was equally ineffectual to destroy the contingent interests in the leaseholds for lives.

The estate of a tenant for life in lands held *pur autre vie* cannot merge in the possible estate therein of his heir or executor; the latter being an independent estate, less in value than the former, and not taken by the heir or executor as a remainder upon the previous estate, but as a special occupancy upon the death of the tenant for life. *Pickersgill* v. *Grey*, M.R. 207; 5 L. T. N. S. 706; 8 Jur. N. S. 632; 31 L. J. Ch. 394.

CONTRACT.

Indemnity—Marine Insurance.—A., having shipped a cargo to England, and insured it at the defendant's office by two policies of £4000 and £3000, sold the cargo to B. for £5300, the contract being expressed to be including freight and insurance, payment in cash in exchange for bills of lading and policies effected

with approved underwriters. On receiving the purchase money A. handed over the policies, but with an endorsement on the £3000 policy that it was transferred to the extent of £1700 only. The cargo being lost, and the balance of £1300 being paid into court by the insurance company—

Held, reversing the decree of V. C. Wood, that B. was entitled to the money. *Ralli* v. *The Universal Marine Insurance Company*, L.J. 278; 6 L. T. N. S. 34; 31 L. J. 313; V.C.W. 150; 2 J. & H. 159; 5 L. T. N. S. 390; 8 Jur. N. S. 495; 31 L. J. Ch. 207.

And see BOARD OF HEALTH; EXECUTOR, 6; FRAUDS, STATUTE OF; JOINT TENANCY, 2.

COPYHOLD.

1. *Fine—Executory devise.*—The case of a devise for life with an executory devise over is on the same footing as a devise for life with a remainder over, and in the absence of a custom to the contrary, the admission of the tenant for life is the admission of the executory devisees, and the lord is not entitled to a fresh fine on the happening of the contigency. But if there is a custom for the payment of a fine, in such a case it will be upheld. *Randfield* v. *Randfield*, L.J. 8 Jur. N. S. 161; 5 L. T. N. S. 698; 31 L. J. Ch. 113.

2. *Copyhold for lives — Renewal by tenant for life — Apportionment of fine.* —When copyholds for lives, which are in settlement, are renewed, the question as to how the money paid as the fine on renewal is to be borne between the tenant for life and remainderman, is one which cannot be decided till the death of the tenant for life, when the extent to which he has benefited by the renewal can be ascertained.

Where the tenant for life had paid part of the fine for renewal under the expectation of setting it off against a possible claim which the estate might have against him and such claim was afterwards established—

The Court held, that his expectation, at the time when he advanced the money for the payment of the fine, did not entitle him to set it off or claim its repayment from the estate during his life-time.

A sum of money laid out by the trustees of a settled estate upon it, with the concurrence of the tenant for life, in the erection of new cattle and cow-sheds, was not allowed as a charge on the inheritance. *Harris* v. *Harris*, M.R. 826.

And see BANKRUPT, 15; RAILWAY COMPANY, 1a.

COPYRIGHT.

Sale for limited period—Unsold stock. —Under a purchase by a publisher of the copyright of a work for four years, the expiration of the period does not determine his right to sell the remaining stock printed by him during the period. *Howitt* v. *Hall*, V.C.W. 381; 6 L. T. N. S. 348.

CROWN.

Felon — Conditional pardon — Husband and wife. — Personal estate devolved on the wife of a felon after his conviction, her interest having been contingent at the time of conviction. The felon obtained a conditional pardon (precluding him from returning to the United Kingdom), and he survived his wife.

Semble, that the crown was not entitled to a fund given to trustees for the wife, and that her legal and personal representatives were entitled. *Re Harrington's Trusts*, M.R.; 29 Beav. 24.

And see SETTLEMENT, 8.

DAMAGES.

In a claim for damages occasioned by pulling up a railway, the defendants must be charged with the damage which is established by evidence, although the burden of proof of making out the damage sustained rests with the plaintiff. *Mold* v. *Wheatcroft*, M.R.; 30 L. J. Ch. 598.

And see BILL OF EXCHANGE, 2; PRACTICE, 43; SPECIFIC PERFORMANCE.

DEBTOR AND CREDITOR.

1. *Creditors' Deed — Execution by creditors — Discretion of trustees.* — Although trustees of a creditor's deed may refuse to allow any creditor to execute the deed until he has produced satisfactory evidence of the existence of his debt, yet, after they have permitted a creditor to execute, they cannot refuse to pay him his share in the dividends, except upon grounds, such as fraud or forgery, which would be sufficient to justify them in coming to this court to have the name of such creditor expunged from the list of creditors executing the deed.

In a suit by a creditor who had been allowed to execute a creditor's deed against the trustees, to have the trusts of such deed carried out, the trustees having, as the Court thought, without sufficient reason, refused to allow him to participate in the dividends declared in respect of the estate, the Court made the trustees pay so much of the costs of the suit as had been occasioned by their having contested the plaintiff's right as a creditor. *Lancaster* v. *Elce*, M.R. 824.

2. *Executor—Release.*—The appointment of a debtor of the testator to be an executor is of no effect as evidence of the extinction of the obligation.

A bond from an executor who had possessed the unbounded confidence of the testator, and conducted all his affairs, was alleged by him to have been released by verbal arrangement or promise by the testator. Interest, however, had been paid upon it. The bond was in the testator's possession at his death, and interest had been paid a short time previously.

Held, that the debtor had not been released, and that the executor was liable for the whole amount. *Re Holmes' Estate, Woodward* v. *Humpage, Inskip's case* (1), V.C.S.; 3 Giff. 352; 8 Jur. N. S. 256.

DOCUMENTS, PRODUCTION OF.

1. *Executor.*—The Court refused to order an executor to produce certain drafts of his testator, which, at the date of the application were in the possession of the bankers on whom they had been drawn. *Bayley* v. *Cass*, V.C.S. 370.

2. *Agent—Plaintiff residing abroad.*—Letters written by a party to a suit, resident abroad, to his agent in England for the purpose of being communicated to his legal advisers in this country, will be protected from production, as also letters between the solicitors and the agent, it not being necessary that a party resident abroad should himself communicate directly with his solicitor in England. But *quære* as to letters from the agent to the principal, not stated to have been written in consequence of any communication with the solicitor? *Hooper* v. *Gumm*, V.C.W. 644.

3. *Agent—Tenant in common—Parties.*—The Court will not compel the production by a defendant of documents in the possession of an agent on behalf of himself and of another person not a party to the suit, who is tenant in common with the defendant of the property to which the documents relate. *Edmonds* v. *Lord Foley*, M.R. 210; 5 L. T. N. S. 709; 8 Jur. N. S. 552; 31 L. J. Ch. 384.

4. *Practice — Contempt.*—A defendant who is ordered to produce documents, and has been committed for not doing so, will be discharged from custody if he can show that they were deposited for money advanced before the institution of the suit, and that he is unable, through poverty, to redeem them. *North* v. *Huber*, M.R.; 7 Jur. N. S. 767; 30 L. J. Ch. 666; 29 Beav. 437.

5. *Practice*—15 & 16 *Vict.*, *c.* 86, *s.* 20.—Under the new practice a defendant may, after decree, obtain an order of chambers for the production of documents by a co-defendant. *Hart* v. *Montefiore*, M.R. 97; 31 L. J. Ch. 333; 5 L. T. N. S. 441; 8 Jur. N. S. 350.

And see PRACTICE, 29.

DOMICIL.

Husband and wife—Gift to children—Foreign Law.—Held, in accordance with the law prevailing in Holland, that children born at Amsterdam, before their parents (domiciled in Holland at the time of such children's birth) had been married, were legitimated by the subsequent marriage of their parents, and entitled to share in a fund standing "to the account of A. (the father) deceased." *Goodman* v. *Goodman*, V.C.S.; 8 Jur. N. S. 554; 6 L. T. N. S. 641.

And see EXECUTOR, 10.

EASEMENT.

Right to water—Mineral workings beneath water course—Subsidence of bed—Loss of supply of Water—Acquiescence.—The plaintiff was entitled to a supply of water for the purposes of his mill, by means of a watercourse or aqueduct passing through the adjoining lands, which belonged to the defendant. In consequence of the working by the latter of a mine under the watercourse the level of the bed thereof was depressed to the extent of four feet for some distance. To prevent the water from overflowing the banks, the defendant had erected a stone wall and embankment. No actual dimi-

nution in the supply of water to the plaintiff's mill was proved in the cause.

Held, in an injunction suit, that the plaintiff was entitled, in consequence of the subsidence which had already taken place in the level of the bed of the watercourse, to obtain the interference of the Court in order to force the defendant so to work his mines for the future that no loss of water should accrue to the plaintiff; but as the defendant had taken steps to prevent any such loss from happening, the Court gave him the opportunity of entering into an undertaking instead of making a hostile decree for an injunction against him—reserving liberty for the plaintiff to apply if there should be occasion. *Elwell* v. *Crowther*, M.R. 815.

And see INJUNCTION, 7.

ELECTION.

A portion of certain entailed estates being accidentally omitted from a disentailing deed and deed of re-settlement, the heir in tail taking a share under the re-settlement, is bound to give effect to it in respect of the omitted portion. *Mosley* v. *Ward*, M.R.; 29 Beav. 407.

And see SETTLEMENT, 1; WILL, 16, 46, 64.

EVIDENCE.

1. *Presumption of survivorship.* — A fund was given to T. in case he should survive his grandmother. T. was a sailor, and was last seen at Portsmouth, in the summer of 1840, about to embark on his ship, and had never been heard of since. His grandmother died ten months afterwards.

Held, that he must be presumed to have survived his grandmother. — *Re Tindall's Trust*, M.R.; 30 Beav. 115.

2. *Will of realty – Office Copy.*—The office copy of a will relating to real estate only, admitted as sufficient proof of the will. *Danby* v. *Poole*, V.C.S. 515.

And see BANKRUPTCY, 3; MISTAKE; PRACTICE, 19; SETTLEMENT, 12, 14; SOLICITOR, 5, 6; SPECIFIC PERFORMANCE, 9, 10, 12; VENDOR AND PURCHASER, 11, 12; WILL, 103.

[TO BE CONTINUED.]

Notice of New Book.

COMMENTARIES ON THE LAW OF AGENCY as a Branch of Commercial and Maritime Jurisprudence, with occasional Illustrations from the Civil and Foreign Law. By JOSEPH STORY, LL.D. Sixth edition. Revised, corrected, and enlarged, by Edmund H. Bennett. Boston: Little, Brown and Company. 1863. 1 vol. 8vo. pp. 658.

In 1826, in an article in The North American Review, Judge STORY wrote: "We perceive an increasing propensity, in our own country, to load and overload new editions of professional works with notes of little intrinsic value, or at most, with notes whose value is materially diminished by the loose and unskilful manner in which they are introduced." The learned judge little imagined, while writing that sentence, the time would come when it might, by possibility, be quoted with reference to an edition of one of his own books. It is matter of regret that he should be compelled to share the fate of Waller's eagle, which espied on the arrow that killed him, a feather of his own.

We have examined this edition, and are constrained to say that the notes are "of little intrinsic value." The additions to the text are well enough. The notes,

for the most part, are nothing but wholesale extracts from the recent reports which are easily accessible to the profession. Entire judgments are inserted in extenso. On page after page there is a rivulet of text meandering through a meadow of notes of this description. The law can never be learned except from the reports. And text-books can never be substituted for the reports. They are but mere indexes to the reports. The importation of the entire opinion of the court in a case into the notes of a text-book, is impertinent, and the merest specimen of book-making. The true method of writing or editing a text-book, is to extract from the cases the principle decided, and the ratio decidendi.

In most of the following cases the whole opinion, on the point under consideration, is printed verbatim et literatim:—

Farnsworth *v.* Hemmer, 1 Allen, 494, p. 27.

Brookshire *v.* Brookshire, 8 Ired. 74, p. 45.

The opinions of WIGHTMAN J. and ERLE J. in Henderson *v.* The Australian Royal Mail Steam Navigation Co. 32 Eng. Law & Eq. R. 167, pp. 61–63.

Le Roy *v.* Beard, 8 Howard, 451, p. 66.

Upton *v.* Suffolk Mills, 11 Cush. 586, p. 70.

Stainbank *v.* Fenning, 11 C. B. 51; 6 Eng. Law & Eq. R. 412, pp. 119–122.

Grant *v.* Norway, 2 Eng. Law & Eq. R. 337; 10 C. B. 665, pp. 125–127.

Beldon *v.* Campbell, 6 Exch. 886; 6 Eng. Law & Eq. R. 473, pp. 128, 129.

Fitzsimmons *v.* Joslin, 21 Verm. 129, p. 150.

Brinley *v.* Mann, 2 Cush. 337, p. 168.

Bank of North America *v.* Hooper, 5 Gray, 567, pp. 176, 177.

Mare *v.* Charles, 34 Eng. Law & Eq. 138, p. 182.

Eastern Railroad *v.* Benedict, 5 Gray, 561, pp. 186, 190.

Wilson *v.* Wilson, 26 Penn. State R. 394, p. 216.

New York Central Ins. Co. *v.* National Protection Ins. Co. 20 Barb. 470, pp. 235–237.

Cumberland Coal Co. *v.* Sherman, 30 Barb. 553, pp. 238–245.

Abbey *v.* Chase, 6 Cush. 54, pp. 300–303.

Lyon *v.* Williams, 5 Gray, 557, pp. 309, 310.

Bray *v.* Kettell, 1 Allen, 80, p. 314.

But this gets tiresome, and we are only half way through the book. Now there is a sufficient reason why Mr. Bennett should have avoided these superfluities; the room they take up might have been better occupied by explanation of real difficulties which he has passed over without a word of explanation. That he is capable of writing concise and accurate notes, is evident to any one familiar with the early volumes of the English Law and Equity Reports and his edition of Greenleaf's Reports. Nearly all of Judge Story's books require to be re-written; and we know of no one more competent to the task than Mr. Bennett; and the owner of the copyrights should be willing to pay him, so that he can afford to perform the labor in a manner satisfactory to himself and the profession.

Hotch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — Littleton, § 267, 176 a.

The present number of our journal is the commencement of a new volume. Our readers will observe that the size of the page is greatly enlarged, and that several other changes have been made.

The leading article in this number, Shakspeare as a Lawyer, is from the pen of Richard F. Fuller, Esq. The Trial of Lady Warriston is taken from a review of Pitcairn's Criminal Trials, by Sir Walter Scott, first published in The Quarterly Review, Feb. 1831, and afterwards in the 21st volume of his Miscellaneous Prose Works.

We shall publish in an early number an article on Rufus Choate, by Richard F. Fuller, Esq.

Messrs. Little, Brown & Co. will shortly publish a new and carefully prepared edition of Wheaton's International Law, by Hon. Wm. Beach Lawrence; The United States Annual Digest, for 1860; and the Life of Hon. Rufus Choate.

A correspondent is informed that Metcalf's edition of Yelverton is rare, and an article of bargain. A new edition by the learned editor would receive an ample reward from the profession.

In some copies of the Second Part of Brownlow's Reports there is a peculiar Preface; in others it is omitted; the reader may perhaps think it might as well have been omitted in all.

In our advertising columns will be found the advertisement of Mr. T. W. Reeve, of New York. In his catalogue will be found many rare law books which he offers at very low prices.

Messrs. Wm. H. Piper & Co. advertise, in our columns, a copy of Hume's History of England. It is a magnificent edition, and should grace one of our public libraries. This firm have a very complete assortment of miscellaneous books; among them are rare English editions of the standard authors.

Mr. George W. Childs, an enterprising and successful publisher of Philadelphia, announces (among other law books) as in preparation, a Treatise on the Law of Easements, by Prof. Washburn. An American book on this subject is much needed. The third edition of Gale's masterly Treatise has very recently been published in England, edited by W. H. Willes, Esq.

At the store of Messrs. Little, Brown & Co., we find from time to time fresh importations of the most costly works in law, science, art, and general literature. They have recently received a splendid copy of Howell's State Trials, in 34 vols. 8vo. in full russia; also a fine set of The Law Journal, 1823 – 1860, 74 vols. small quarto, in half calf; and the Statutes at Large, Magna Charta to 1861, inclusive, 101 vols. calf, a fine set, uni-

formly bound. They have a copy of the Year Books, with Fleetwood's Index, 11 vols. folio. This is the best edition.

Very rich editions of Pothier, Locrè, D'Aguesseau, and the Code Civil, published at Paris, with all the attractions of modern art, will also be found at Little & Brown's.

Mr. Charles H. Scribner, of Mount Vernon, Ohio, announces as in preparation a treatise on the Law of Dower.

In answer to an inquiry, we would say that the first edition of Reeves' History of the English Law was published, 1784, 4to. 2 vols. Second edition, 1787, 8vo. 4 vols. Third edition, 1814, 8vo. 4 vols. A fifth volume, containing the reign of Elizabeth, and Index to the whole work, was published in 1829, 8vo.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1862.	Returned by
Blanchard, Charles (1)	Stoughton,	September 13,	George White.
Blanchard, George B. (1)	Stoughton,	" 13,	George White.
Brown, Horace P.	Grafton,	" 13,	Henry Chapin.
Crayan, Patrick	Boston,	" 10,	Isaac Ames.
Davis, Luther	Charlestown,	" 15,	William A. Richardson.
Drury, David A.	Spencer,	" 13,	William A. Richardson.
Elliott, John M.	Boston,	" 11,	Isaac Ames.
Filer, Louisa F.	Belchertown,	" 11,	Samuel F. Lyman.
Foster, Benjamin Wood	West Roxbury,	" 6,	George White.
Fullerton, Jacob	Boston,	" 4,	Isaac Ames.
Goddard, Peter M. (3)	Buckland,	August 5,	Charles Mattoon.
Gooding, Amos M. G.	Dorchester,	September 15,	George White.
Hall, Leonard	Boston,	" 23,	Isaac Ames.
Hayden, Caleb	Braintree,	" 16,	George White.
Hazard, Samuel L.	Cambridge,	" 5,	William A. Richardson.
Houghton, Phineas W.	Boxborough,	" 23,	William A. Richardson.
Howe, Charles	Wendell,	August 15,	Charles Mattoon.
Kennan, James S.	Holden,	September 11,	Henry Chapin.
Kent, James C. (2)	Upton,	" 11,	Henry Chapin.
Kent, Oliver S. (2)	Upton,	" 11,	Henry Chapin.
Miller, Charles	Somerville,	" 11,	William A. Richardson.
Miller, Selden	Southwick,	July 12,	John Wells.
Newton, Charles H.	Shrewsbury,	September 4,	William A. Richardson.
Newton, John E.	Shrewsbury,	" 4,	William A. Richardson.
Poland, Benjamin	West Cambridge,	" 29,	William A. Richardson.
Raddin, Thomas, Jr.	Lynn,	" 15,	Geo. F. Choate.
Richardson, Warren	Medford,	" 13,	William A. Richardson.
Ring, Asa F.	Newton,	" 20,	William A. Richardson.
Stone, George E.	Leicester,	" 30,	Henry Chapin.
Stratton, Eben E. (3)	Buckland,	August 5,	Charles Mattoon.
Taylor, David	Lynn,	September 15,	Geo. F. Choate.
Tucker, Simeon	Stoughton,	" 24,	George White.

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